# CROSSING THE MILITARY MINEFIELD:
# A JUDGES' GUIDE TO MILITARY DIVORCE IN NORTH CAROLINA

by Mark E. Sullivan*

## Introduction

During any period of active-duty deployments and Reserve/Guard mobilizations, there will undoubtedly be many plaintiffs or defendants who are on active duty in the armed forces. This guide highlights some of the issues related to the impact of military service on civil litigation, financial obligations, custody and family support in North Carolina.

## Starting the Lawsuit – Service of Process

In general, the rules for service on military bases and on ships in U.S. waters are set out in: 32 C.F.R. § 516 for the Army or 32 C.F.R. § 720.20 for the Navy and Marine Corps. If the logical first option, certified mail, will not work, then the plaintiff should consider service by sheriff or process-server. There is no office or agency at military bases that will accept service of civil process on behalf of a servicemember (SM). The point of contact for answering questions about how to serve a family member or SM on a military installation is the provost marshal's office (PMO), also known as the office of the military police, special police or shore patrol, depending on branch of service. At many military bases within the United States, a deputy sheriff or process-server is allowed to effect service on the base by contacting the PMO to coordinate the delivery of legal papers to the individual involved. If the member or dependent is on base, the PM representative requests his or her presence to take delivery at that office. Sometimes the member's commander or supervisor will suggest that the SM voluntarily accept service if this arrangement is not available.

Outside the U.S., service can be difficult, expensive and time-consuming. Again, voluntary acceptance may be available, and certified mail may work. Remember that a commander or supervisor who receives civil lawsuit papers through the mail cannot serve

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them on the individual involved.

For service personnel aboard ships outside U.S. waters, serve by mail (FPO) or request voluntary service through the commander. As a last resort, arrange for service through foreign-nation authorities when the ship reaches port.

When the member is stationed overseas, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters may be useful.[1] The United States is a party to this, and so are many nations which are bases for military personnel, such as Spain, Belgium, Egypt, Germany, the Czech Republic, Italy, Japan, Turkey, the Netherlands and the United Kingdom. The text of the treaty is at 28 U.S. Code Appendix, following the annotation of Rule 4 of the Federal Rules of Civil Procedure. Further information on the treaty may be obtained from the U.S. Marshal's Office (see DOJ Memo No. 386, dated 15 June 1977).

Very briefly, the procedure to serve people located in signatory nations is as follows: The plaintiff's attorney fills out a request form (LAA 116) and mails it with the documents to the foreign nation's "Central Authority" (except for Israel and Great Britain -- for these countries, the court clerk must mail the documents). The address and other information are available at the U.S. Code cite above and at the memo from the U.S. Marshal's Office. For some countries, the documents will have to be translated; see the Appendix in 28 U.S. Code for further information. To get a translation, try the nearest high school, college or university for foreign language help. In the alternative, contact the nearest consulate for the country involved. For information on nonsignatory nations, consult the Office of Citizens' Consular Services, (202) 647-3675. Use of the Hague Convention may involve a long wait; sometimes it may take several months for the papers to be served on the individual in question. Attachments 1-5 give more detail about service in Germany, Italy, the United Kingdom and Japan, where the majority of U.S. forces abroad are stationed.

A few notes about service of process in Germany might be helpful, since there are many military personnel from the U.S. armed forces located there. There is no "US citizen" exception to the Hague Service Convention regarding service of U.S. state court process. The rules of the Convention apply irrespective of the nationality of the person to be served.

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[1] TIAS 6638, 20 UST 361, 15 Nov 65. The text can be found in Martindale-Hubbell Law Directory Vol VIII, (http://www.martindale.com) or at 28 U.S.C. Appendix, Annotation to Rule 4, Fed. R. Civ. Procedure

Germany has very specific rules requiring personal service in the German statutes. Service can be quashed if it conflicts with the terms that Germany imposed in adopting the Hague Service Convention. One such condition is that the papers served bear a German translation. This is true even if the person to be served is an American citizen who doesn't speak a word of German; the rules must be followed even through this may be contrary to common sense. Another condition is that service be through the Central Authority, not by direct mail.[2] For assistance on serving civil process in Germany, contact the German Federal Institute for Guardianship Affairs at the following address:

Deutsches Institut fuer Vormundschaftswesen
Postfach 10 20 20
69010 Heidelberg
Federal Republic of Germany

For service of process in nations which are not parties to the Hague Convention, it may be necessary to consult with an attorney in that foreign nation about how to serve civil process when certified mail is refused by the defendant.

**Soldiers' and Sailors' Civil Relief Act**

Congress passed the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA), as amended, to address the civil law impact of activation of Reserve and Guard personnel, as well as the military duties of those serving on active duty in the armed forces. The Act is applicable only in civil proceedings, not criminal actions.[3]

Reservists are protected under the SSCRA. So are members of the Army and the Air National Guard when activated under Title 10, United States Code or under Title 32 for a federally declared emergency involving federal funding (pursuant to the Veterans Benefits Act of 2002).

The protection begins on the date of entry on active duty and generally ends within 30 to 90 days (and in certain cases for up to six months) after release from active duty. The current law is in 50 U.S.C. App. 501-548, 560-593. Courts have generally constructed

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(U.S.C.A.) (http://www.law.cornell.edu/uscode/).

2 Vorhees v. Fischer & Krecke, 697 F.2d. 574 (CA4 1983)(both conditions were breached and service was quashed); *see also* Harris v. Browning-Ferris Industries Chemical Services, Inc., 100 FRD 775 (MD La. 1984) and Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982).

3 104-193, Sec. 325, 363, 110 Stat. 2105 (1996).

the SSCRA liberally to protect those in uniform. The U.S. Supreme Court has said that the statute should be read "with an eye friendly to those who dropped their affairs to answer their country's call."[4]

**Stay of Proceedings**

In the area of family law, there are several key provisions. The first of these is 50 U.S.C. App. 521. Under this section, a member may request a stay of proceedings, which will be granted *unless* military service does not *materially affect* his ability to prepare and participate in the proceeding. This doesn't justify automatic stay orders or authorize abuse of the system, however. The decision on whether or not to grant a delay is in the sound discretion of the trial judge based on the specific reasons and military exigencies advanced by the member who moves for a continuance. In particular, the Act calls for fairness and equity *for both sides* while courts are considering the effects of military service. Here is an overview of the stay section:

- A servicemember (SM) who is a party (not a witness) in civil judicial proceedings may request and obtain a stay of proceedings if specified conditions are met.
- The request for a stay can be a motion by the member or on the court's own motion. It may also be in the form of a letter or affidavit from the SM or his commander.
- The court must find that the member's ability to prosecute or defend is "materially affected" by reason of his or her active duty service.
- Once the court makes this finding of material effect, the member is entitled to a stay for such period as is necessary until the material effect is removed.
- Since courts are reluctant to grant long-term stays of proceedings, they can and should require members to act in good faith and be diligent in their efforts to appear in court.
- Examples of domestic cases that are covered include divorce (Smith v. Smith,[5] holding that it was an error to deny a stay in a divorce action where alimony was an issue), custody (Lackey v. Lackey,[6] reversing a trial court which changed custody in a case involving the servicemember's children in which he had requested a stay and

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4 Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

5 222 Ga. 246, 149 S.E. 2d 468(1966).

then was denied same), and paternity (Mathis v. Mathis,[7] holding that a servicemember's absence in a paternity action materially affects his ability to defend, unless specific findings are made otherwise).

**Motion for Stay**

A judge can issue a stay order on his own initiative, but he is not expected to be a mind-reader. The court need not assume that a member is asking for a stay when no request has been brought to the judge's attention. An illustrative case on this point is In the Matter of the Paper Writing of Sue H. Vestal,[8] which involved a *caveat* proceeding to challenge the probate of a will. The trial court dismissed the *caveat* after finding that the caveators had willfully and blatantly ignored the court's orders for discovery compliance without reasonable excuse and that they were openly disrespectful to the court. One caveator, Colonel Weaver, contended that he was prevented from responding due to his involvement in the Gulf War.

Interrogatories were served on the caveators in March 1989. In May 1990, with the interrogatories still unanswered, the propounder filed a motion to compel. In August 1990, when Iraq's invasion of Kuwait (which would lead to the Gulf War) occurred, the caveators filed an answer to the motion to compel, requesting a two-week extension of time. At a hearing on the motion to compel, the judge granted the two-week extension and ordered the caveators to pay $150 in attorney's fees in thirty days. The propounder filed another motion to compel in September 1990. At a hearing in October 1990 the judge found that the caveators had still not answered the interrogatories and had paid the $150 two weeks late. At that point the judge struck the pleadings of the caveators and dismissed their case with prejudice.

On appeal, Colonel Weaver alleged that "he was not required to respond because of protections afforded him" by the SSCRA. The Court of Appeals found that Weaver had neither filed a motion to stay under 50 U.S.C. App. 521 nor an affidavit with supporting facts. Without a request for a stay by the caveator, the only remaining issue was whether the court should have granted a stay on its own motion. The Court stated that:

- The only information about Weaver's military service was found in two unverified

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6 236 So. 2d 755 (Va. S. Ct. 1981).
7 236 So. 2d 755 (Miss. S. Ct. 1970).

papers signed by his attorney;

- They failed to show whether Weaver ever requested military leave to answer the interrogatories; and
- They failed to provide sufficient information to show that the trial court abused its discretion by failing to issue a stay on its own motion.

The court quoted with approval from an Indiana case which noted that "the man in service must himself exhibit some degree of good faith and his counsel some decree of diligence."[9]

The lessons in Vestal are several. First and foremost, the SM should always file a motion and an affidavit seeking a stay when one is needed. As a practical matter, the SM shouldn't ask for a stay if he is only answering interrogatories. Phone calls and correspondence can be used to prepare answers most of the time. And a member shouldn't call upon the SSCRA for help when the events that led to the Gulf War occurred *18 months after* the interrogatories were served. Finally, the court need not accord SSCRA protections to a party who is in the armed forces when good faith and due diligence have been lacking on his part.

**Material Effect**

The focal point for a stay motion is not military status in itself, but rather the effect it has on the member's ability to participate in the preparation and trial of his case. If a court finds there is a material effect on the ability to defend or participate in the litigation, then the court *must* order a stay. If the judge denies the request for a stay, he or she *must* make findings of fact about lack of material effect and ensure that there is sufficient evidence in the record to warrant a denial.

What is "material effect"? There is no one definition of this term. The court should make a finding of "material effect" when specific facts show that a member's ability to prosecute or defend a civil suit is impaired by military duties, such as inability to obtain leave to appear in court at the designated time and place, or to assist in the preparation or presentation of the case.

The impairment can be geographic, logistical, legal or economic. A *geographic* effect

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8 Vestal, 104 N.C App. 739, 411 S.E. 2d 167 (1991).

9 Vestal, 104 N.C. App. at 744, 411 S.E.2d at 170, quoting from Sharp v. Grip Nut Co., 116 Ind. App. 106,

might be the member's location in a faraway assignment which makes it impossible for her to attend trial. A *logistical* impairment might be the member's inability to receive and send mail or e-mail due to the nature of the assignment, or his "24/7" duty assignment which lacks any free time to devote to the litigation. A *legal* problem might be involved if a servicemember has classified orders which may not be lawfully released to the court for a determination of her availability. An *economic* disability would be the inability of the servicemember to hire an attorney or retain an expert. An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations, such as child support or alimony.

**Material Effect – an Example**

An illustration of what should be considered "material effect" is found in a 1981 N.C. Supreme Court case, Cromer v. Cromer.[10] In that case the SM was ordered to pay increased child support in November 1979. Prior to that hearing, the SM attempted to obtain a stay under the SSCRA. His commander wrote a letter to the presiding judge stating that operational requirements prevented the SM from taking leave until January 1980. He subsequently signed an affidavit on the SM's behalf and sent it to the district court, stating that Jack Cromer, the defendant, was "Chief of the Boat," the sole interface between enlisted men and officers on the nuclear submarine *USS Skate*, that operations at sea were scheduled for the last two weeks in November 1979, and that he had advised Mr. Cromer that he would not be permitted to take leave.

Now the mystery begins. For some reason, the letter and affidavit only showed up as part of the petition for discretionary review in the Supreme Court (after the Court of Appeals had upheld the trial court's increase in child support and order of garnishment). They were not part of the record on appeal. They did not appear in any lower court file. And counsel for the defendant, in oral argument before the Supreme Court, explained that he was unaware of these documents at the time the orders were entered in the trial court.

Regardless of this irregularity -- or perhaps because of it -- the Court reversed the judge's orders, stating that "the trial court might have proceeded in another manner had it

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111, 62 N.E.2d 774, 776 (1945).

[10] Cromer v. Cromer, 303 N.C. 307, 278 S.E.2d 518 (1981).

been aware of these documents."[11] This case shows that *it's never too late*, that the motion and affidavit can still help the SM in the appellate process to show "material effect" of military service. It also shows the value of a detailed and specific affidavit and motion requesting only a limited stay, for about two months in this case. Although not stated as such by the Supreme Court, the facts in the affidavit clearly had a *material effect* on Jack Cromer's ability to defend himself.

**Inquiring into "Material Effect"**

Nothing in the Act requires the court to grant a stay motion without a hearing. The non-moving party is entitled to her day in court, her opportunity to challenge the request. Perhaps she can establish that the information provided is false. Perhaps she wants to challenge a stay letter which contains only vague and conclusory statements. Perhaps the member has exaggerated the length of time he would need for the trial in order to ensure that his leave request will be denied. Whatever the situation, the court should afford the non-moving party an opportunity to be heard in determining whether there is an adverse material effect caused by military duties.

When the judge inquires into "material effect," there are several points that he or she ought to consider in trying to arrive at a just solution for all parties. The cases and decisions recognize that the mere wearing of the uniform is not, in itself, a material effect which will prejudice the member's ability to defend or prosecute.

There is no clear formulation of who has the burden of proof to show a "material effect." As stated by the U.S. Supreme Court in Boone v. Lightner:

> The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.[12]

Although it is logical to require the burden of proof to be on the movant (*i.e.,* the SM who is

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11 303 N.C. at 311, 278 S.E.2d at 520.

12 Boone v. Lightner, 319 U.S. 561 (1943)

requesting a stay of proceedings), some courts have stated that *both parties* may be required to produce evidence on the issues.[13]

The starting point for the court's inquiry should be the statute itself. Ordinarily a stay should be granted unless the court finds that the member's military service does not have a material effect on his or her ability to prosecute or defend the lawsuit. The duty of the court is to examine the reasons why the material effect should or could have that impact, and it is within the court's power to require information and justification for the stay request from the SM. After all, it is the SM who is best able to explain the nature of the material effect and how it impacts detrimentally on the lawsuit's progress and the member's participation.

Instead of simply presuming such an effect because the member is on active duty, the court should inquire into the nature of the material effect to ensure that justice is done for all parties. The court may allow discovery by the non-moving party for the limited purpose of uncovering facts to determine the nature and effect of the claimed material effect. The defendant, for example, might request copies of the member's current LES (Leave and Earnings Statement), his or her military orders, any leave request submitted by the member to his commander, and the response thereto.

As a condition of granting a stay, the judge can require the member to submit a detailed statement as to how the member's military service has a material and adverse effect on his or her ability to prosecute or defend, such as an affidavit setting out all the facts and circumstances of the alleged disability. This would be executed by the member since he would have the best knowledge of his disability, limitations and constraints in participating in the lawsuit. The court needs to know, for example, whether the member is on duty every day, including weekends, having no time for personal affairs, or whether his duties are from 7:30 to 4:30, the normal "military day," with most weekends free. Mere conclusory statements, such as "I request a stay because my military service has a material effect on my ability to participate in this lawsuit," are worth little in determining material effect. Such statements should be supported by facts, reasons and details of "how" and "why."

**Conclusory Statements**

A case illustrating the problem with broad, conclusory averments is Booker v. Everhart.[14] In March 1974 the plaintiff, an attorney who had represented the plaintiff-wife, sued for his fees on a note from defendant-husband. The husband's parents guaranteed the note. In May 1975 the defendant joined the Navy and was sent to the Philippines, where he remained through trial. In January 1976 the defendants (the husband and his parents) moved that that case be "entirely removed from the trial calendar" pursuant to the SSCRA on the ground that the husband would be absent from trial.

In response, the judge denied the motion and set the trial for April 1976. A month after that order and a month before the trial date, the defendants noticed plaintiff for the taking of the deposition of the defendant-husband *in the Philippines* two weeks before the trial. The judge granted a protective order to plaintiff, and the deposition was not taken. At the trial the court granted a directed verdict for plaintiff and the defendants appealed.

The Court of Appeals, in ruling on defendants' claim that the trial court erred in denying a stay under 50 U.S.C. App. 521, noted that the Act mandates a continuance where military service would cause a party to be absent, but it also allows the judge to deny a continuance if, in his opinion, the SM's ability to conduct his defense is not materially affected by reason of his military service. The Court then noted the following facts:

- The defendant-husband, who volunteered for naval service, was sent to the Philippines fourteen months after the lawsuit was filed;
- There was no showing in his affidavit that he requested leave or would not be able to obtain leave to be present at trial;
- There was no showing in his affidavit, beyond a mere conclusory statement, that his defense would be prejudiced or his rights impaired materially by his absence;
- His deposition had already been taken in May 1974 by plaintiff in the presence of counsel for the defendants; and
- Defendant-husband, an attorney licensed in North Carolina, took no steps to seek a speedy determination of the case prior to going on active duty.

Based on the above, the Court upheld the trial judge's order, which found that the SM's absence would not materially prejudice his defense. The Court noted that the SM's use of

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13 Gates v. Gates, 197 Ga. 11, 25 S.E.2d 108 (1943).
14 Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

the SSCRA was likely based on policy and strategy, rather than on the necessities of military service.

The lessons of the Booker case are that the member must present more than a vague and conclusory affidavit; he should make a clear and detailed showing that he will be prejudiced by his inability to appear and defend. There should also be a statement as to whether leave was requested and the results of such a request, although this is not required by the SSCRA.

**Contested Claims, Stages**

The judge may inquire regarding which claims are contested and which are not, so as to allow uncontested issues to be resolved, leaving for further consideration those which are contested. If there is no factual dispute, why postpone the matter? If a custody case is before the court, perhaps the absent SM will not be contesting custody but only challenging child support. Most divorces granted in every state are uncontested. The defendant in an uncontested divorce should not be allowed a stay of proceedings.[15] Nothing in the Act says that a stay must apply to *all* claims and issues in a lawsuit, regardless of contested status.

Likewise the judge may inquire into which *stages* of the lawsuit should be stayed and which should proceed, based on the facts adduced by the member. As an example, take the stage of the lawsuit involving *answering the complaint.* This typically means that the member-defendant needs to respond to each factual allegation with "Admitted," "Denied," or "Denied for lack of knowledge or information sufficient to form a belief." If the member complains that he or she cannot participate in the lawsuit because of the material effect that military duties impose, it would be appropriate for the court to inquire what difficulties are imposed by the simple answering of the complaint, so that the issues may be joined and the court may know what issues are uncontested and which are in dispute. With this known, arguably the court can allow the uncontested matters to proceed and examine more closely the issues which are contested.

At the outset of many domestic actions is a stage which is called "mandatory disclosure" in local or state rules. This usually involves such actions as filling out a financial affidavit, completing an inventory of marital and separate property for equitable distribution purposes, or exchanging expense and income documents. Suppose, for example, that the

local rules require each party in a child support case to produce a current pay statement and serve it on the other side within thirty days of the start of the lawsuit. The applicable document for a servicemember is the LES (Leave and Earnings Statement). Whether the member is an activated Reservist who is serving in Hawaii, an active duty member performing peacekeeping duties in Kosovo, or an activated Army National Guard soldier stationed in Japan, there is usually no reason why he or she cannot produce a current LES, which is provided at mid-month and the end of the month to all servicemembers. This would not be true, of course, if the member were fighting at the front lines in Iraq or participating in a covert mission in Somalia or Peru. Thus there might be no reason to stay the initial disclosure requirements for the military member in an appropriate case.

Consider a document request under Rule 34 which demands production of the member's last three federal tax returns. A servicemember stationed far away from his books and records might have difficulty in complying with this request, one might assume. However, this might not be a valid assumption if, for example, the soldier's current wife were in possession of the books and records back at their home in Fayetteville and could easily provide them to him or to the court. The court could also require the member simply to request a copy of the tax returns from the Internal Revenue Service rather than producing copies which he has in storage at his now faraway home. Once again, there would be a difference in the court's response if the member were fighting at the front lines or on a secret mission.

In each scenario, the court should examine the requested action, determine whether the request is reasonable, what actions the member must take in response, how his response may be affected prejudicially by his military duties, and whether the response is impossible or difficult. The court should, in other words, examine *whether* and *how* the member is prejudiced by the material effect alleged in his request for a stay. If the responsive action expected of the member (such as appearance in court or obtaining documents) is shown to be difficult or impossible, then a stay may be in order. If neither of these is involved, the court may find that the response should be required but more time allowed to the member, or perhaps that substituted actions ought to be allowed, such as a

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[15] *See, e.g.*, Palo v. Palo, 299 N.W.2d 577 (S.D. 1980).

member's executing a release to allow the non-military member to obtain bank records or tax returns directly from the institution or agency involved.

Even when the member is able to prove that he or she cannot be present for a certain proceeding, the court needs to determine whether the member's *presence* is required. Take a contested child support case as the example. The non-custodial father's presence may not be needed if the mother can make the case without him. If he hasn't requested a variance from the child support guidelines, then the only issues are parental income, the cost of work-related day care, and the child's portion of the medical insurance premium. In a military case, the father's income is published and available for all to see; the base pay, Basic Allowance for Housing and Basic Allowance for Subsistence, as well as special pays, can be found at the website for the Defense Finance and Accounting Service (DFAS), which is www.dfas.mil. There is no premium for military medical insurance, known as TRICARE. The mother would be able to produce evidence of her income and work-related day care. Thus the father's presence would not be necessary if he had not requested a guideline variance, and no continuance need be granted.

Other courts have used creative approaches to avoid granting stays requested in SSCRA motions.[16] In Keefe v. Spangenberg,[17] the court denied a stay request to delay discovery and suggested that the servicemember consider a videotape deposition under Federal Rule of Civil Procedure 30(B)(4). In Jackson v. Jackson,[18] the court denied an SSCRA stay because under state law the obligor's presence was not necessary in a proceeding to review the amount of support. In In re Diaz,[19] the court stated that "court reporters may take depositions in Germany including videotape depositions for use in trials in this country."

**Military Leave**

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16 The military member may be nominally involved but is not a "necessary party" to the contested litigation. In Bubac v. Boston, 600 So. 2d 951, (Miss. 1992), the father was in the armed forces. He was found by the court, however, not to be a necessary party to the litigation, which involved the mother's habeas corpus challenge to the maternal grandmother's retaining custody of the children. Another court held that there is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved. In Shelor v. Shelor, 259 Ga. 462, 383 S.E. 2d 895(1989), the court stated that, as a general rule, temporary modifications in child support do not materially affect the rights of a military defendant since they are interlocutory in nature and subject to future modification.

17 Keefe v. Spangenberg, 533 F. Supp. 49, 50 (W. D. Okla. 1981)

18 Jackson v. Jackson, 403 N.W. 2d 248 (Minn. App. 1987).

19 In re Diaz, 82 B.R. 162, 165, No. BR-87-40571-COL (U.S. Bankruptcy. Crt. February 5, 1988).

In weighing a request for a stay, the court should keep in mind that members from all branches of military service, from the lowest sailor or airman to the highest-ranking general or admiral, are entitled to thirty days of leave each year, accruing at the rate of 2.5 days per month. The court can take judicial notice of this fact.[20] Military leave must be requested, and a commander may turn down a leave request when military necessity so dictates. Current overseas postings usually last around three years for an "accompanied tour" (with family members), and less than that for unaccompanied tours in such host countries as Turkey, Korea and Iceland. This information regarding leave is important in most cases where the SM is claiming nonavailability.

When in doubt as to whether a member has shown material effect due to military service which prejudices him in participating in the litigation, the judge has the discretion to request a more specific affidavit detailing the member's efforts to appear in court, for example, and the next court date when he or she would be available. Such an affidavit should also detail the member's attempts to obtain the assistance of counsel. In addition, it should describe just what the leave request contained; if a member were to request a month's leave, effective immediately, in order to attend a child support hearing, the commander would probably turn it down, even though no such amount of time would be needed in reality. In order to judge a member's good faith, the court should inquire into what was contained in the leave request, rather than relying on broad generalities, such as "My commander denied me any leave to attend this hearing."

The court should also keep in mind that members who are going through basic or advanced training may be unable to appear in court due to the training schedule. No extra days are built into the schedule to accommodate court dates, depositions or family emergencies. When a trainee is absent from the training program, this frequently means that he or she must repeat the same training program all over again.

**Length of the Stay**

Under 50 U.S.C. App. 524, a stay of proceedings may last for such period as is just, up to and including the remaining term of service of the member. The duration of the stay may be the period of service plus 60 days. But the key is

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[20] Underhill v. Barnes, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

reasonableness. In Keefe v. Spangenberg,[21] the court granted a solder's stay request for a one-month continuance but denied his request for a stay until his expected date of discharge three years later. Some judges will grant a limited of three or four months, after which the court will review the facts again to determine whether a further stay is needed.

If the unavailability of a servicemember is only temporary and will end at a fixed date in the near future, then the court will usually grant a stay. Such would be the case if the member were a sailor deployed for a six-month mission on a ship or if a soldier were on a field exercise for several weeks.

Counsel for the SM should avoid requesting stays that are unreasonably long since most courts understand the availability of leave for service personnel, even if they are stationed overseas. The courts will carefully scrutinize *extended unavailability*, particularly when it is *unexplained*. In these cases, the judge will usually demand that a member make some showing that he has attempted to delay his departure for an overseas assignment or to secure leave to return to the U.S. from an overseas duty station. Be sure to check on whether the servicemember has requested leave to appear in court. If he has not, it may be difficult for him to establish "due diligence."

Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, the court or counsel for the non-military member may write to the commander and ask him or her when the member can be allowed to take leave.

In order to solve some of the problems associated with unavailability of military personnel, the Welfare Reform Act of 1996 required the armed forces to issue regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child support hearings.[22] Department of Defense Directive 1327.5, "Leave and Liberty," now states that when a servicemember requests leave to attend paternity or child support hearings, leave "shall be granted" unless the servicemember is serving in a contingency operation or unless "exigencies of service" require that leave be denied.

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[21] Keefe v. Spangenberg, supra Note 17.

[22] *See* Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997).

**Diligence, Good Faith**

Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[23] In Judkins v. Judkins,[24] the lawsuit started in August 1988 when the wife filed a lawsuit for divorce from bed and board, custody, child support, alimony and equitable distribution. The defendant, an Army lieutenant colonel stationed at Ft. Bragg, filed an answer that contained counterclaims for custody, child support and equitable distribution. Discovery was initiated before April 1989 and continued through August 1990, when Iraq's invasion of Kuwait started the deployment that led to the Gulf War. At that time "the Court continued the matter over because of Defendant's service with the United States military in that action."[25]

But that didn't end the dispute. Although combat in the Gulf War was finished in February 1991, the plaintiff continued to attempt to obtain information from defendant through discovery and the defendant continued to resist. The plaintiff filed motions to compel discovery responses in July 1991, December 1991 and February 1992. In February 1992, a year after the conflict ended, the judge entered an order requiring the defendant to produce documents to the plaintiff. The defendant still didn't comply with the discovery order and plaintiff's requests.

Trial was set for April of 1992. It was continued at defendant's request. The trial judge contacted the Army and was told that defendant was "on a mission" and that he would be available in July 1992. The court ordered a continuance until July 1992. When that date rolled around, defendant's attorney again requested a continuance, stating that defendant would be available to complete discovery and the pretrial order on or before August 3, 1992, and would be available for trial on August 31, 1992. The court once again granted a continuance, setting the case peremptorily for hearing on August 31, 1992.

There should be little surprise about what happened next. The defendant failed to respond to discovery, failed to complete the pretrial order and moved for a continuance on August 31, adding (apparently for the first time) a motion for a stay under the SSCRA. The trial court found that the defendant had failed to exercise good faith and proper diligence in

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[23] *See, e.g.*, Boone v. Lightner, 320 U.S. 809, 64 S. Ct. 26, 88 L. Ed.(1943), Plesniak v. Wiegand, 31 Ill. App. 3d 923, 927-30, 335 N.E. 2d 131(1975), Underhill v. Barnes, 161 Ga. App. 776, 288 S.E. 2d 905(1982), Palo v. Palo, 299 N.W. 2d 577 (SD S. Ct. 1980), and Judkins v. Judkins, infra at note 24.

[24] Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

appearing and resolving his case and then denied the motions of defendant.

The Court of Appeals framed the issue as whether the trial judge had erred in denying the defendant's motion for a stay. It stated that:

- The only evidence of defendant's unavailability was a letter from the Army stating that the defendant was to depart for Southeast Asia on August 30, 1992 for about 46 days;
- There was no evidence in the record as to whether the SM had at any time requested leave to defend the action or whether leave was likely to be granted upon request; and
- The defendant made no showing as to how his defense would be prejudiced or his rights materially affected by his absence.

The Court of Appeals accepted the trial court's determination that the SM had failed to exercise good faith and due diligence, quoting approvingly from the Vestal case.

The Judkins case teaches that a stay will not be granted without a showing of good faith and proper diligence, and that the courts will usually need to see a statement from the SM as to whether leave was available and had been requested. A stay is not forever. Contrary to the popular notion of many members, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. The stay is, in fact, intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay of proceedings. In the event of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

When a servicemember demonstrates bad faith in his dealings with the court, a stay of proceedings should be denied. In Riley v. White,[26] a soldier failed to submit to blood tests in a paternity action before going overseas and was aware of the court proceedings, had an attorney to represent him and was previously given a delay by the court to take the tests required; the court's denial of his stay request was upheld. In Hibbard v. Hibbard,[27] a soldier who had been in contempt for three years for refusing to comply with visitation orders was denied a stay in the ex-spouse's change of custody action.

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[25] 113 N.C. App. at 738, 441 S.E.2d at 141.
[26] Riley v. White, 563 So. 2d 1039 (AL App. 1990).

**Mobilization and Family Support**

Problems frequently occur when a mobilized Reservist or Guard member is paying support. Contrary to the assumptions of some servicemembers, there is no law, federal or state, that stops or suspends payments of child support or alimony when a Reserve or Guard member is mobilized. Nor does any law require a reduction of child support or alimony upon the mobilization of the payor. Such a reduction might be logical in many cases. Frequently a payor takes a substantial cut in pay when activated in the Guard or Reserves. But the reason for no automatic reduction is that a SM doesn't necessarily have a reduction in income when returning to active duty from civilian life.

Let's look at the situation of Captain Jane Green, a member of the Marine Corps Reserve. She is divorced and pays child support to her ex-husband. In civilian life she works as a public school teacher earning $30,000 a year. But with 8 years of creditable service, when she goes on active duty her base pay alone is $45,000 a year. When you add in BAS and BAH, this comes to over $50,000 annually, almost twice her civilian salary. She probably wouldn't get a reduction in child support when she is recalled to active duty. In fact, her ex-husband might even apply for an *increase* in child support!

A more likely situation, however, would involve National Guard Sergeant John Smith, who is mobilized and takes a one-half cut in his pay. If he pays his ex-wife directly, he may decide to cut the payments in half or just stop payment while he is on active duty. If he is subject to a garnishment through his employer, then the garnishment will end when he leaves work for the National Guard. In either case, Mrs. Smith, his former wife, will need to obtain a new court order garnishing his military pay. She will face difficulties in locating him, in serving him with a motion for garnishment and in surviving his motion for stay under the SSCRA.

If, on the other hand, there is a generic garnishment, applying to the specific employer and any other full-time employer, then Mrs. Smith will not need a new hearing. Rather, she will need to transmit a certified copy of the garnishment order to Defense Finance and Accounting Service so that it can be used to attach Sergeant Smith's military pay.

If she is successful in obtaining a hearing so that the garnishment will apply to his

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[27] Hibbard v. Hibbard, 230 Neb. 364, 431 N.W. 2d 637(1988).

military pay, or if she is successful in initiating a new garnishment through DFAS as shown above, there are still problems that must be addressed. Since Sergeant Smith is only earning half of his civilian pay, in effect the percentage of his pay that will be garnished has doubled. In order words, he may be paying "too much child support." He *should* file a motion to reduce child support. But how can he do this if he's patrolling the perimeter of Bagram Air Base in Afghanistan?

If he is only asking for an amount of child support indicated by the child support guidelines, then he might hire an attorney to file the motion, provide his latest LES to the attorney, and hope for the best at time of trial. If he needs to testify, because of a variance request or for some other reason, then it may be advisable to obtain his testimony by video deposition, telephone, Internet connection, or videoteleconference.[28]

At the modification hearing, the court should note several factors. There may, on the face of it, appear to be a good case for reducing support because of a reduction in the payor's income. But it is important to remember that there are many other factors that can play a part in the judge's decision about granting a motion to reduce support.

- What if the other parent has just lost her job?
- What if the SM has income from other sources -- such as interest, dividends or rental income?
- What if the child's needs have recently increased due to medical or educational reasons and the child needs *more*, not less, in child support?
- What if child support was set low to begin with (several years ago) and there hasn't been any increase since then?
- And finally, what about the SM's own expenses? Maybe they will be lower while he or she goes on active duty. This might be the case, for example, if the member applies for a reduction in your home mortgage rate to 6% and asks for a stay (that is, a suspension) of loan payments due to lower income on active duty, pursuant to the SSCRA. All of these circumstances would have to be considered by the court in ruling on a motion to reduce support.

Even if none of the above applies and the member's income has been cut in half, that doesn't mean that his child support is also halved as well. When a court considers a

motion to reduce support, it looks to see whether there is a *substantial change of circumstances* since the entry of the last order for support. If there isn't, then the motion is denied. If there is such a change in financial circumstances, however, then the court will usually "wipe the slate clean" and start all over again to determine a fair amount of child support.

**Mobilization and Custody/Visitation**

Multiple custody and visitation problems can occur in the case of a mobilized Reserve or Guard member as well. Try this one on for size: Jane Doe is a sergeant in the Army Reserve. She has custody of Debbie Doe through a Cumberland County court order entered after a full hearing. John Doe, the father, was properly served, and is a party to the suit. He was present for the hearing. He obtained scheduled visitation rights in the hearing and regularly exercises them.

Sergeant Jane Doe is mobilized on short notice. She is being sent to Fort Benning, Georgia, for a month of in-processing, after which she will be deployed to Kuwait (which is definitely an "unaccompanied tour"). In light of this, she decides to drop off the daughter with her parents in Pinehurst for the duration of her deployment. She even gives her folks a power of attorney.

However she does not notify John Doe. When Mr. Doe hears of the transfer he files his own motion for custody. He might even resort to self-help by going to Pinehurst to pick up Debbie Doe without a court order, thereafter filing his motion. Or he might not even file a motion, leaving it up to the grandparents to seek court intervention.

Upon his filing, he may or may not request *ex parte* emergency custody of Daughter. He does, however, need to serve Mom. How can he locate her? Perhaps he can obtain help from her prior Reserve unit, getting a copy of her orders. Maybe the Red Cross can help in locating her. Perhaps the local JAG office might assist (or maybe not).

And then there's the problem of serving her. If she is in transit to Ft. Benning, he can get the documents to the nearby deputy sheriff or process server for coordination with the base provost marshal to serve her there. If she's on board ship, good luck. If she's in Kuwait, he could try certified mail.

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[28] *See* Keefe v. Spangenberg, supra note 17 and In re Diaz, supra note 19.

Assuming Jane Doe is served, she will probably take the papers to a JAG office, speak to a legal assistance attorney there (who will likely be a young judge advocate 1-5 years out of law school), who will help by sending a letter from Jane's commander to the judge or to John's attorney. The letter will likely request a stay of proceedings under the SSCRA , 10 USC App. Section 521, alleging that Sergeant Jane Doe's military service has a material and prejudicial effect on her ability to defend against John's motion.

What will happen when her honor is advised of the stay motion? What should she do? If she stays the proceedings, then what happens to Debbie Doe? What if Dad hasn't just gone off and taken her but knows where she is and wants custody of her for the duration? Denying Mom's motion would appear to violate federal law -- the SSCRA makes it clear that, when an applicant proves military service and convinces the court that such service has a material effect on her ability to prosecute or defend, the court *must* grant a continuance.

But granting Mom's motion means that the court cannot decide who takes care of Debbie during mom's deployment. It means that the decision is left to one of the parties – Jane Doe – rather than to the courts. Essentially it ties the court's hands on a matter of crucial importance, the day-to-day care of a minor child. Judges *don't* like that!

Possibly the judge will decide to move forward with testimony and solicit Jane's participation through telephone, videoteleconference or Internet video. Perhaps the judge will designate the order "interim" or "temporary," as that might solve things on a temporary basis, without prejudice to either party. There is no "right answer" to such a problem – only difficult alternatives.

**Stay of Execution**

The SSCRA also provide for staying the execution of a judgment. This is found at 50 U.S.C. App. 523. As to any case filed against a military member, the court may grant a stay of the execution of a judgment or order entered against the member, and vacate or stay an attachment or garnishment on its own motion. When this is upon motion by the member or someone on the member's behalf, the court must grant the above relief unless the court determines that the member's ability to comply with the judgment or order is not materially affected by reason of military service.

**Default Decrees -- Do's and Taboos**

The court can enter a default judgment in the absence of the member-defendant, but there are restrictions under the SSCRA. When the plaintiff applies for a default judgment or when the moving party attempts to have a hearing in the absence of the defendant, the SSCRA applies. It requires the movant to sign and file an affidavit with the court stating that the other party is in the military, is not in the military, or the movant does not know, before a decree or judgment can be obtained by default. If the affidavit indicates the other party is in the military or the movant does not know, the SSCRA indicates the court should appoint an attorney to represent the other party. These provisions do not apply *unless the member failed to appear at all*. If, for example, the member has counsel of record, or has filed pleadings in the case, this provision is inapplicable. 50 U.S.C. App. 520 governs default entries and reopening defaults. If the court fails to appoint an attorney then the judgment or decree is voidable.

**Appointment of Counsel**

Under Section 520(1), counsel will be appointed on behalf of the absent member, Sergeant John Smith, to *invoke these SSCRA rights* before entry of a default judgment (*i.e.*, any order or judgment entered in his absence). The SSCRA does not say what the appointed attorney does, but the probable role of the attorney is to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. No provision of the SSCRA says who pays the appointed attorney.

The SSCRA also allows the court to require the moving party to file a bond as a condition for the entry of a default judgment, in addition to the other provisions set out above, in order to indemnify the absent servicemember against loss or damage in case the decree is later overturned. The court can also make such other provisions as are deemed necessary to protect the member's rights.

**Reopening a Default Judgment**

Reopening a default judgment is covered at 50 U.S.C. App. § 520 (4). This section states the judgment must have been entered during the term of service or within 30 days

afterwards, that the request must be made to the court which entered the judgment, and this must be done during the term of service or within 90 days after the end thereof. A member cannot have made any appearance in the action, and the courts generally construe the filing of an answer (either *pro se* or through counsel) as to a general appearance. The court is not required to set aside a default judgment if there was no prejudice by reason of service in the armed forces. A New York court, for example, refused to set aside a default separation decree against a servicemember when he was fully advised of the pendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of his trial. The court in this instance held that he was not prejudiced due to his military service in defending the action.[29] In a California case, the court ruled that if a member against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, then his military service did not prejudice him.[30]

**Meritorious Defense**

The member's application to set the decree aside should be granted if the member can show that he or she has a good and legal defense to the claim. Such a requirement avoids a waste of effort and resources in opening default judgments in cases where servicemembers have no defense to assert. A good example of this is found in Smith v. Davis.[31] There the SM was served with a complaint in May 1985 alleging that he had been paying $100 a month for the support of his child and requesting an increase to at least $150 a month.

In response the SM sent a letter in June 1985 to plaintiff's attorney admitting receipt of the summons and complaint but asking that plaintiff's attorney recognize his rights under the SSCRA. The defendant did not appear at the hearing, nor did an attorney on his behalf, and no attorney was appointed to represent him, as is required under 50 U.S.C. App. 520. An order was entered that he pay $225 a month in child support.

The defendant filed a motion to reopen the judgment and submitted an affidavit in support of the motion. The affidavit stated that at the time of the support hearing he was on active duty in the Marine Corps, he was stationed in California, his unit was subject to

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29 Burgess v. Burgess, 234 N.Y.S. 2d 87 (N.Y. Sup., October 17, 1962).

30 Wilterdink v. Wilterdink, 81 Cal. App. 2d 526, 184 P.2d 527(1947).

deployment to the western Pacific at any time, and that his military duties made him unavailable to defend at that hearing. He also stated that, upon arrival at the base, he experienced "pay problems" that left him without a paycheck for four months. The trial court denied his motion.

The Court of Appeals, however, reversed that decision after conducting a clear and concise analysis of the "default provisions" of the SSCRA, 50 U.S.C. App. 520. The Court found that --

- There was a default (that is, no appearance by the defendant or an attorney on his behalf);
- The trial court had not appointed an attorney for him (as is required by the SSCRA);
- The motion of defendant was timely (made no later than 90 days after termination of military service);
- The defendant showed prejudice stemming from his military service; and
- He also showed that he had a meritorious defense (that is, he lacked the ability to pay support).

The primary lesson in Smith v. Davis is the importance of detailed factual statements in an affidavit that is filed on a timely basis with the trial court. The defendant in this case based his affidavit on the four D's -- Distance, Deployment, Defense and Deficit (that is, inability to pay).

**Resources**

What about Internet resources for SSCRA research? For a great starting place, fire up your ISP (internet service provider) and start with a visit to the home page of the Army JAG School, http://www.jagcnet.army.mil/TJAGSA. When you get there, click on "Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Soldiers' and Sailors' Civil Relief Act Guide," a thorough examination of every section of the SSCRA by the faculty of the Army JAG School.

You can also find useful material at these locations:

- "Soldiers' and Sailors' Civil Relief Act Provides Umbrella of Protection" - Department of Defense article, Armed Forces Information Service: http://www.defenselink.mil/specials/Relief_Act/

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[31] Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).

- US Coast Guard article on SSCRA: http://www.uscg.mil/mlclant/LDiv/soldiers1.htm
- Air Force Academy article on SSCRA: http://www.usafa.af.mil/10ja/ssra.htm
- Coast Guard Fact Sheet on SSCRA: http://www.uscg.mil/legal/la/topics/sscra/SSCRA_Factsheet.htm
- Article by Carreon and Associates, Cypress, CA, on SSCRA: http://www.carreonandassociates.com/soldiersact.html
- The Army Judge Advocate General's Corps public website: http://www.jagcnet.army.mil/legal.

**Paternity**

For each of the military services, paternity is a civil matter to be determined by the courts. A military commander will not become involved in disputed cases, other than to refer the servicemember (or the nonsupport complainant) to the civil courts for resolution of this issue. The commander has no authority to order DNA testing or to enforce compliance with a court order to submit a tissue sample. Voluntary samples may be drawn by military health officials. The degree of cooperation varies from location to location.

**Child Support**

Military regulations specify what is required for support when the parents of a child are separated (or not married) and there is no court order or agreement for child support. These are known as interim support regulations. However a court order is the best way to obtain enforceable child support. An order supersedes the interim support regulations. Each branch of the armed services will comply with valid orders for child support, wage assignment or garnishment.

**Military Pay**

Military compensation consists of basic pay and other entitlements. Base pay is the wage paid to a servicemember. It is subject to the usual taxes that are deducted from anyone's paycheck – federal and state income tax withholding, Medicare, FICA, etc.

The BAH, or Basic Allowance for Housing (formerly known as Basic Allowance for Quarters), is a nontaxable housing allowance paid to all military personnel who do not live in government quarters or who are separated from their family members. The higher the rank of the SM, the higher the BAH. The amount is different if there are dependents or no

dependents, but there is no increase based on *number of dependents.* The amount also varies according to the member's geographic location in recognition of the varying housing costs throughout the world. You may obtain the BAH tables from a military finance office or from the Defense Finance and Accounting Service's web site, www.dfas.mil.

Entitlements may also include the Basic Allowance for Subsistence (BAS), Variable Housing Allowance (VHA), special skill pay (such as flight pay for pilots or "jump pay" for those who are on airborne status), and bonuses (*e.g.*, reenlistment bonuses).

To find out how much Sergeant John Smith is earning, review a copy of his monthly pay statement, called the Leave and Earnings Statement, or LES. It shows his Base Pay, BAH, BAS, tax withholdings, voluntary allotments to pay bills or support, and accrued leave. Carefully review his allotment deductions -- they can be used for elective payments (*e.g.*, an allotment can be for a car payment or an automatic savings plan). Also pay close attention to the following:

- How much leave has the member accrued (to determine whether an SSCRA stay is justified)?
- What state does the member claim as legal residence or domicile for income tax purposes? This may be important for jurisdictional issues.

While Federal and state tax returns may be helpful in discovering other income, don't use them to look for military entitlements, since some of these are *tax-free*.

**Resources for Understanding the LES**

The best websites to use in explaining how to read and understand the various fields and entries in the LES are:

- http://*www.servicity.com/spousenet/les.cfm*> (site contains a sample LES with "interactive' tutor -- moving mouse/cursor over sections of the LES prompts "pop up" details about each section.; website also includes a section on common pay issues);
- *http://militarypay.dtic.mil/*> (sponsored by the Office of the Under Secretary of Defense for Personnel and Readiness and contains information on military pay and benefits and covering such topics as pay grades by rank, BAS, BAH and special pay);
- *http://www.nellis.af.mil/units/99cpts/LESFAQ.html*> (glossary of terms used in each field of the LES);

- *http://www.lifelines2002.org>* (contains article under *Pay and Personnel Topics* by Megan Sather, "*Understanding Your Navy LES (Leave and Earnings Statement)*" plus brochure with same title under *Resources* section, "Understanding Your Income"); and
- *http://www.dfas.mil/money/milpay/les_djms.pdf* (containing an eight-page LES explanation published in June 2002 by DFAS).

**Setting Child Support**

The court should consider *all* pay and allowances in setting the support obligation. The judge should also consider housing and meals provided to military members. The BAH and BAS amounts should be constructively added to the member's pay, as the reasonable value of the "in kind" income. This would be appropriate whether the member is actually receiving these allowances or whether the member receives the benefit "in kind" by living in government quarters and eating at the "base dining facility," which used to be called the "mess hall." In fact, in an appropriate case (as with a senior officer or enlisted member), the judge might take testimony from a qualified witness on the equivalent value of the on-post housing of the SM instead of accepting at face value the monetary equivalent shown as the BAH.

The court should also note that these allowances are not taxable. Since state guidelines are based on gross pay and assume that all pay is taxable, it may be appropriate to adjust military pay upward to factor in the nonexistent taxes. Since the Guidelines presume that all income is taxable, converting these two sums into their taxable equivalents would allow application of the Child Support Guidelines as originally intended by the drafters of the Guidelines. The amount of the adjustment would be the actual tax rate on the member's taxable income. It would also be appropriate to add in the member's constructive share of FICA and Medicare taxes that would apply if these allowances were so taxable.

As an example of how to recalculate the taxable equivalent of the BAH and BAS, assume a servicemember earns $24,000 a year from his base pay, that he receives $500 in nontaxable BAH and BAS, and he pays $4,800 in federal income tax. This means that his actual tax rate is 20%. To convert the nontaxable entitlements into their taxable equivalent for federal income tax purposes, follow the steps below:

A. Find his actual tax rate. [This is 20%, as shown above]

B. Convert this to a decimal and subtract it from 1.00. [This would be 1.00 - .20, or .80]

C. Take this figure and divide it into the sum of the BAS and BAH above. [$500 ÷ .80 = $625]

D. The result will be the federal taxable equivalent of these nontaxable allowances. Thus $625 is the taxable equivalent of the BAH and BAS of $500 for federal tax purposes.

Use the same approach for state taxes if the member is from another state. If he or she is from North Carolina, the judge can use 7% as a close estimate of the tax rate.

**Medical Expenses**

These days health insurance covers most, but not all, medical expenses. At the outset it is vital to find out whether the nonmilitary parent has private medical insurance covering the children and what is covered. A typical policy may have an annual deductible amount of $250, cover 80% of most medical expenses and exclude entirely such items as elective surgery, routine physical examinations and dental work.

Military dependents are entitled to medical treatment at military hospitals and are covered for civilian health care purposes by TRICARE, which covers a portion of allowable medical expenses. This is the military equivalent of medical insurance. TRICARE is a cost-sharing program. Just like any private medical insurance program, there is an annual deductible amount and co-payments are required. Information about TRICARE can be found in the TRICARE Standard Handbook, available at the nearest uniformed services medical facility or through the TRICARE Management Activity, 16401 E. Centretech Parkway, Aurora, CO 80011-9043. Information is also available from the TRICARE website, www.tricare.osd.mil.

As to coverage alternatives for the children, one option for parents who are both working is to have each parent maintain insurance. This provides "double coverage" (usually through TRICARE and a less expensive employer-sponsored plan) and reduces uncovered medical expenses to an insignificant amount. Another alternative is to have the noncustodial parent maintain medical coverage (either through TRICARE or private insurance) while both parents split the uncovered portion equally (or in some specified ratios, such as ¾ for dad and ¼ for mom). The advantage of this option is that it puts part of the financial burden on the custodial parent--who is the one most likely to "take the child

to the emergency room with the sniffles," according to the complaints of some noncustodial parents.

For medical care and health insurance, it is first necessary to determine whether the child (or spouse in an alimony case) is enrolled in the Defense Enrollment Eligibility Reporting System (DEERS). If the family is intact, the military member (also known as the "sponsor") initiates the dependent's enrollment by filling out DD Form 1172. When the family is separated, the custodial parent can start the process by mail and then come in to the nearest military base to sign the final documents. With a child over ten years old, a military dependent ID card will be issued and the child's picture will be taken. Contact the nearest military installation for more details. The location of the nearest place for enrollment or military installation can be obtained from the DEERS Telephone Center: 800-334-4162 (California only); 800-527-5602 (Alaska and Hawaii); or 800-538-9552 (all other states).

Once a child is enrolled in DEERS, he or she is eligible to receive medical care in two ways:

- Medical care and medications may be obtained from military hospitals and clinics at no charge; or
- TRICARE can be used with civilian health care providers. It is usually best to use military facilities for medical care, since it cuts down on paperwork, time and costs. The branch of service of the enrollment site doesn't have to match the branch of service of the military parent; thus although the father may be in the Air Force, the family members can get treatment at the nearest Navy facility, for example.

Children born outside marriage are entitled to medical care TRICARE if the following conditions are met:

a. The child is acknowledged and supported by the member; or

b. There is a judicial decree of paternity.

c. A military I.D. card is issued to prove eligibility. If the member will not cooperate in getting a card for the child, his or her commander can coordinate issuance of the card.

**Garnishment**

Federal law allows garnishment for enforcement of periodic family support obligations.[32] The pay that is subject to garnishment includes: (1) federal civilian employee pay and retirement annuities; (2) military active duty pay (basic pay and certain bonuses, but not BAH or BAS); (3) military retired pay; (4) Reserve pay; (5) any other "remuneration for employment."[33] To obtain a garnishment[34] of military pay, one must first get a court order which directs DFAS to withhold child support from the pay of the noncustodial parent. This must then be served on DFAS. The order must include member's name, status (*i.e.*, active duty, civilian, retiree, etc.), and Social Security Number.

The amount subject to garnishment is the lower of the state or federal ceiling. The federal rule[35] is: 50% to 65% of net pay, depending on family situation and length of time in arrears. The state ceiling is set by state law. G.S. 110-136 says that 40% of disposable pay (gross pay less Social Security, taxes and mandatory retirement) is the maximum for single orders. With multiple orders the maximum goes up to 45% or 50%.

A member's defenses include claims that the garnishment was for an impermissible purpose, the garnishor's noncompliance with 5 C.F.R. § 581, subsequent litigation enjoining the garnishment and possibly an appeal of the underlying support order, if a stay was granted by the court.

**Involuntary Allotment**

Another way to attach military pay for support purposes is through the use of an "involuntary allotment". Also known as a "mandatory allotment," this is actually a wage withholding action that's enforceable against active duty servicemembers. It can be used to attach active duty military pay (basic pay plus bonuses, *plus* BAH and BAS in some cases). It's usually easier to obtain than a wage garnishment, and more money may be available.

An involuntary allotment requires an initial order that establishes support. This may also be an order for alimony *and* child support. There must be an arrearage in an amount equal to or greater than *two months' support* under the order. Once this happens, the court or the state Child Support Enforcement Agency can send a notice to the military requesting initiation of an involuntary allotment. The "notice" can simply be a letter, and no prior

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32 *See* 42 U.S.C. § 662(f).
33 *See* 5 C.F.R. § 581.
34 *See* 15 U.S.C. § 1673.
35 42 U.S.C. § 665; 32 C.F.R. § 54.

notice to the obligor is necessary. The notice is sent to the same office as for garnishments (see below), and it is transmitted by registered or certified mail. It must include the member's name and SSN as well as a statement that there are arrearages equal to or greater than 2 months' support (and, if true, that the obligor is in arrears for more than 12 weeks). Also include a copy of the underlying order certified by the clerk of the court, the date the allotment should stop and a statement certifying that the writer is an "authorized person" under 32 C.F.R. § 54.3 (such as a state CSE agent, clerk or judge). The allotment will be established for the amount of the monthly support obligation. If arrearages are sought, they must be requested and there must be a court order requiring the payment of accrued arrearages.

The federal limits are the same as for garnishment (50%-65%), but the amount of pay available for attachment usually is greater. A servicemember's defenses, which must be established by affidavit and evidence, are that:

- The underlying order has been vacated or modified; or
- The amount alleged to be in arrears is erroneous.

The address for garnishment and involuntary allotment is DFAS [Garnishment Operations], P.O. Box 998002, Cleveland, Ohio 44199-8002. For the Coast Guard the address is Commanding Officer (LGL), U.S. Coast Guard Pay and Personnel Center, Federal Building, 444 S.E. Quincy Street, Topeka, KS 66683-3591. Addresses for all other federal agencies and DOD Civilians are found in Appendix A, 5 C.F.R. Part 581. Another useful resource is the Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel." This cam be found at: http://www.acf.dhhs.gov/programs/cse/fct/militaryguide2000.htm#relief

**Custody, Visitation and Military Personnel**

Some people claim that there's a bias against military parents in custody cases. As with everything else in the area of custody litigation, the real answer to this question is "It depends." If the defendant, Sergeant John Smith, is assigned to a unit that frequently deploys overseas, has irregular training schedules that often involve weeks spent "in the field," or has other limitations that would impact on his ability to care for a child, then he's surely going to have an uphill battle in asking for custody while he's on active duty. These can often prove to be insurmountable obstacles when a judge is trying to find stability,

continuity, predictability and security for a child.

On the other hand, military duty can be a real advantage if the issues of scheduling and deployments can be addressed. The quality of schools on base is generally good, and they are run by a Federal agency, DODDS (Department of Defense Dependent Schools). Most military installations have excellent recreational facilities and an active "dependent youth activities" program. There are good day care facilities for those with normal duty hours (and sometimes those with unusual hours, as well). And, finally, the opportunity to travel to other states and countries is a chance for learning and enrichment that most children just don't have. So it's really possible to make a great argument for military custody, so long as the moving party is able and willing to provide for the children and make the sacrifices that custody involves.

Visitation can be challenging in military cases. It's best to plan for *long distances*, even if the parties are both "local" at the start of the case. Many military personnel find themselves reassigned in a PCS (permanent change-of-station) move after three to five years at one installation. Thus Sergeant Smith could be traveling to Germany or Korea in the next move.

When drafting a visitation schedule for the children, the judge should try to set down a local schedule and a long-distance one. The local one can be "every other weekend Friday to Sunday" or whatever the local practice suggests. The long distance one, on the other hand, should provide in the appropriate case for visitation for several weeks in the summer and for a week or two during the Christmas holidays. It also needs to specify who pays for airline tickets, how they are provided to the custodial parent, and how a child who cannot travel alone will be transported to the non-custodial parent's residence for the visitation.

When there is an issue involving returning a child who is being kept in violation of an order, the court should use DoD Directive 5525.9, dated December 27, 1988. It requires compliance of servicemembers, employees, and family members outside the U.S. with court orders requiring the return of minor children who are subject to a court order regarding custody or visitation. The Army's regulation implementing this is found at Chapter 4 of AR [Army Regulation] 608-99.

**Divorce Issues**

Domicile is an essential element in a divorce case. One of the parties to the divorce must call North Carolina "home" for legal residence purposes (such as paying state taxes and voting here) if the divorce is to be valid. The Soldiers' and Sailors' Civil Relief Act allows military personnel the right to retain their original domicile for state taxation purposes, regardless of where they are stationed. Check closely to see which of the parties is domiciled in North Carolina when ruling on a complaint for absolute divorce, and be sure to inquire, when it is the SM who alleges legal residence in North Carolina, what indicators of domicile apply.

North Carolina appears to have a special rule granting to a SM the right to apply for a divorce here when he has been stationed in the state for six months:

***G.S. 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff***

*In any action instituted and prosecuted under this Chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this Chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.*

This would appear to allow Sergeant Smith, who has been stationed here for over six months but is domiciled elsewhere, to file here for divorce against his wife who does not live in North Carolina and is not domiciled here. Not true. A 1961 decision of the N.C. Supreme Court, Martin v. Martin,[36] has construed this to mean that Sergeant Smith's living on base does not disqualify him from claiming that he is living in this state. The Supreme Court stated that this statute is not to be construed to mean that true *domicile* in North Carolina is not required for the court to assert jurisdiction over the marriage of the parties. Domicile still is required, and this restrictive interpretation of G.S. 50-18 will mean that, when neither party is domiciled here, the suit for divorce or dissolution will have to be filed elsewhere.

Thus one of the parties must be domiciled in North Carolina (and have indications of this domicile, such as paying taxes, home ownership or voting). The only person who would be adversely affected by this restrictive interpretation of G.S. 50-18 is the

[36] Martin v. Martin, 118 S.E. 2d 29, 253 N.C. App. Lexis 704 (1961).

servicemember who is domiciled elsewhere, wants to get a divorce here and has a spouse in another state. This SM could not get a divorce in North Carolina. As the Martin case points out, a servicemember may still claim North Carolina as his domicile (so long as he can prove it at the hearing on divorce). A key issue if this occurs will be whether the member has been paying state income and personal property taxes. And a servicemember can still get a divorce here if the member's spouse is residing here and domiciled in North Carolina.

**Military Entitlements and Divorce**

The granting of a divorce in military cases will affect the privileges, legal rights and entitlements of the nonmilitary former spouse in several ways. First of all, she will lose her military entitlements in most cases -- ID card, base housing, commissary and post exchange privileges, medical care at on-base facilities. She will need to turn in her military ID card. Arrangements must be made for future medical care and insurance for her, since she will no longer be entitled to TRICARE coverage for herself or treatment in a military medical facility. Here's a helpful table prepared by the U.S. Army Judge Advocate General's School that outlines many of these issues regarding entitlements:

| Uniformed Services Former Spouses' Protection Act | Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes | | | |
|---|---|---|---|---|
| | Number of Years | | | |
| Benefits for Former Spouses | 0 to <10 | 10 to <15 | 15 to <20 | 20 or more |
| Division of Retired Pay | X | X | X | X |
| Designation as an SBP Beneficiary | X | X | X | X |
| Direct Payment | | | | |
| Child Support | X | X | X | X |
| Alimony | X | X | X | X |
| Property Division | | X | X | X |
| Health Care | | | | |
| Transitional | | | X | |
| Full | | | | X |
| Insurance | X | X | X | X |
| Commissary | | | | X |
| PX[2] | | | | X |

| | | | | |
|---|---|---|---|---|
| Dependent Abuse | | | | |
| Retired Pay Property Share Equivalent | | X | X | X |
| Transitional Compensation | X | X | X | X |

Be sure to consider carefully any issues that must be preserved in the pleadings, such as alimony or maintenance, as well as property division. If property division claims are not preserved in the divorce action, Mrs. Smith could lose her claim to a part of his military retirement rights (see below).

**Military Pension Division**

A 1982 federal law, the Uniformed Services Former Spouses' Protection Act, or USFSPA, allowed the division of military pensions as marital property as of June, 1981. The Act is found at 10 U.S.C. § 1408. Its primary purposes were:

- To let the states to treat disposable military retired pay as marital or community property, according to each state's law;
- To allow certain former spouses to receive their share, up to 50%, of disposable military retired pay directly from DFAS (the Defense Finance and Accounting Service);[37]
- To let some former spouses continue to receive commissary, exchange, and health care benefits;
- To allow former spouses to be designated as Survivor Benefit Plan beneficiaries; and
- To authorize certain former spouses who are victims of abuse to receive a court-ordered share of military retired pay even though the military member was not retired, but rather was punitively or administratively discharged because of the misconduct involving abuse.

The regulations interpreting USFSPA are located at 32 C.F.R. § 63 and at Volume 60, Number 66 of the *Federal Register*. There are several excellent resources for a good

[37] When a member is eligible for retirement but receives a punitive discharge from a court-martial or is discharged via administrative separation processing, the member's retired pay is lost. In certain cases where these terminations of service were based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. *See* Pub. L. 103-484. A ten-year overlap of marriage and service is required for receipt of payments.

understanding of military pension division. These include Willick, Military Retirement Benefits in Divorce (American Bar Association Family Law Section, 1998); Edwin C. Schilling III, "Major Issues in Military Divorces", 1996 Wiley Family Law Update (John Wiley & Sons, Inc., 1996); and Sullivan, "Military Pension Divorce: Crossing the Minefield," Family Law Quarterly, Vol. 31, No.1, Spring 1997.

**Jurisdictional Issues for Military Pension Division**

State exercise of jurisdiction over a military pension must, of course, comply with state jurisdictional statutes. But when there's a military pension, a whole new set of federal jurisdictional rules comes into play also. The new rules are set out in 10 U.S.C. § 1408(c)(4), which specifies that a state may exercise jurisdiction over a member's pension rights *only if*:

- It is his domicile;
- The member consents to the court's jurisdiction; or
- The member resides there *but not due to military assignment*.

These are the *exclusive federal rules* for deciding whether the court has the power to divide pension rights. They override any state rules, laws or cases to the contrary.

When the issue is domicile, don't be deceived by a military member who mentions his "Home of Record." This is a technical term the military services use for the state where a person enters the service or reenlists. It is an administrative entry which isn't meant to specify the *domicile* of the military member. It designates the place to which a SM's personal belongings will be shipped upon discharge.

Domicile, as a basis for dividing military pensions under 10 U.S.C. §1408(c)(4), means the "fixed home" of the military member, the place to which he would return if told to "go home." It is the place where a member votes, pays taxes and is eligible for in-state college tuition, the place where a person resides indefinitely and to which he intends to return after temporary absences. Remember that a member of the military may be stationed far away from his or her legal home.

The importance of the member's actions -- which are a reflection of the intent of the individual -- cannot be overstated. Many military members claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to back them

up, such as voting or ownership of property in that jurisdiction, and sometimes that the member has never really resided in that state in the first place.

How do you find out Sergeant Smith's domicile? This should be done through discovery. Counsel can take his deposition and ask him "Where's home?" The spouse's attorney can serve document requests on him and ask for a copy of his LES, which contains an entry for "State Taxes" showing what state the member has listed for state tax withholding. Counsel can demand to see his DD Form 2058, "State of Legal Residence Certificate," which is executed along with his W-4 Statement for tax withholding purposes.

If Sergeant Smith is stationed in North Carolina and domiciled here, he can be sued here for pension division. If he is domiciled elsewhere, it may be necessary to bifurcate the equitable distribution proceeding (and sue him elsewhere) if he does not consent to the court's jurisdiction over his military retirement rights.

It is permissible for a court to divide a military pension *based upon consent* of the military member to the court's exercising jurisdiction over the pension. Although this is a very complex area, a simple rule might be: "If he joins in the lawsuit, he's consented to the court's jurisdiction." And if he joins in the part of the lawsuit concerning equitable distribution of marital or community property, there's a pretty good argument that he's subjected himself to the jurisdiction of the court by *consent*.[38]

This issue -- what constitutes consent -- is a state law question, not one of federal law. As a general rule, any responsive pleading or request for affirmative relief (including a request for a stay under the Soldiers' and Sailors' Civil Relief Act) can be considered a general appearance sufficient to subject the member to the court's jurisdiction. In Judkins v. Judkins, supra, the Court of Appeals noted:

> "A general appearance is one whereby the defendant submits *his* person to the jurisdiction of the court by invoking the judgment of the court in any manner or any question other than that of the jurisdiction of the court over his person." In re Blalock, 233 N.C. 493, 64 S.E 2d 848 (1951). Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E 2d 522 (1984)...Defendant made a general appearance thereby consenting to personal jurisdiction by seeking the affirmative relief in his answer without contesting personal jurisdiction. Stern v. Stern, 89 N.C. App. 689, 367 S.E.

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[38] A general appearance constitutes "consent"; the member need not specifically consent to jurisdiction to divide the pension. *See, e.g.*, Kildea v. Kildea, 143 Wis. 2d 108, 420 N.W.2d 391 (1988).

2d 7 (1988); Hale v. Hale, 73 N.C. App. 639, 327 S.E. 2d 252 (1985).

**Dividing the Pension**

Under USFSPA, the court can only divide *disposable retired pay.*[39] The U.S. Supreme Court upheld this requirement in Mansell v. Mansell.[40] According to USFSPA, "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial forfeitures, or due to the Dual Compensation Act (when a retired member gets a federal civil service job and forfeits a portion of his pension);
- most disability pay benefits; and
- Survivor Benefit Plan premiums.[41]

Federal law prohibits the division of more than 50% of the member's disposable retired pay except in limited circumstances, such as successive divorce decrees. Except for Puerto Rico, which does not allow the division of any retirement benefits, all states and territories make *some provision* for the division of military pension rights earned during marriage. Of course, if the marriage was short the nonmilitary spouse would only be entitled to a small portion of the retired pay since the amount of the pension she receives (or, for that matter, any other property acquired *in part* during the marriage) depends on how long she was married while the pension was being earned.

**VA Disability Payments**

As noted above, disability benefits are, in general, excluded from "disposable retired pay." One of the biggest problems in dividing military retired pay is the retiree's post-decree election of disability benefits from the Department of Veterans Affairs (VA). If Sergeant John Smith has some service-related disability, he might be able to elect to receive monthly disability compensation payments from the VA. To qualify for these, he would have to waive an equivalent amount of his military retired pay. Almost all retirees who can make this election do so. Why? There are

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39 10 U.S.C. § 1408(c)(1).
40 490 U.S. 581, 109 S. Ct. 2023, 104 L.Ed. 2d 675, 57 U.S.L.W. 4567 (1989).
41 10 U.S.C. § 1408(a)(4).

two distinct benefits for the retiree who is divorced:

> a) While taking this option doesn't provide an increase in gross income, it does yield a net increase in pay since the VA portion of Sergeant Smith's compensation is tax-free. Thus if Sergeant Smith's pension (without disability) were $1,000 per month and his disability were evaluated as equivalent to $600 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits still total $1,000 but only $400 of this is subject to taxes if he makes this choice.
>
> b) In addition, the VA benefit is not subject to division as property. Only the longevity-based portion of the pension is subject to pension division in state court.

Courts will try very hard to help the spouse when there is a disability reduction after the divorce. In North Carolina, the courts may reconfigure the equitable distribution award if a retiree reduced the former spouse's share of the military pension by electing VA disability after the equitable distribution judgment (or increasing his disability rating).[42]

Another potential problem for the former spouse is when Sergeant Smith leaves military service *before* he's eligible to retire. In an age of downsizing in the armed forces, this is not uncommon. Few civilian lawyers (and even fewer spouses!) realize that a member can "roll over" his retirement into a federal civil service job and get a year-for-year credit on civil service retirement based on the time he spent in the military.[43] Even fewer lawyers and spouses have the foresight to anticipate this situation will occur "a few years down the road" and possess a working knowledge of the statute allowing this credit. One way to handle the problem in the court's order is to include a clause that states:

> If Defendant fails to retire from military service and elects to "roll over" time in his military service into federal government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any federal retirement pay or annuity he receives based on

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[42] White v. White, 152 N.C. App. 588, 568 S.E. 2d 283, 2002 N.C. App. LEXIS 958, *affirmed* 2003 N.C. LEXIS 423.

[43] Pursuant to 1997 amendments to 5 U.S.C. § 8332 (Civil Service Retirement Act) and 5 U.S.C. § 8411 (Federal Employees Retirement Act), a member can no longer count his years of military service towards a civilian federal retirement unless he authorizes the Office of Personnel Management (OPM) to deduct an amount for the former military spouse.

> the parties' period of marriage during Defendant's period of military service. Defendant is ordered to notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and to include in said notification a copy of his military discharge certificate, DD Form 214. Defendant is also ordered to notify Plaintiff immediately if he takes a job with the federal government, and to include in said notification a copy of his employment application and his employment address.

**Survivor Benefit Plan**

An important part of military pension division the Survivor Benefit Plan (SBP), which is an annuity that lets retired military members (both active duty and reserve) provide continued income to specified beneficiaries at the time of the death of the retiree.[44] SBP is funded by premium payments from the retiree's paycheck. There's a slight tax break for the retiree because the amount of the SBP premium is not included in the taxable portion of retired pay.

What happens without SBP? "When the soldier dies, the pension dies" -- the death of a military retiree terminates all pension payments. With SBP coverage, on the other hand, upon the retiree's death the designated survivor receives a lifetime annuity. SBP payments are for up to 55% of the base amount of a member's retired pay, except that there is an adjustment after age 62 for Social Security benefits. Thus, for example, if the total pension payment before division is $3,000 a month, the SBP payment would be $1,650 a month and the premium would be $192 paid during the member's life until the beneficiary turns 62, at which point the payment drops to $1,050 monthly due to Social Security.

**Advantages and Disadvantages**

The advantages of SBP coverage for Mrs. Smith are:

- Security: There is no "qualification" required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member cannot terminate coverage.
- Life Payments: She will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which terminates benefits).

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[44] 10 U.S.C. §§ 1447-1455.

- Tax-Free: Deductions from the husband's retired pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
- Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.

The disadvantages of SBP are:

- Expense: Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up. Spouse of former spouse coverage is about 6.5% of the selected base amount of retired pay.
- Inflexible: As a general rule, once SBP is chosen it can't be cancelled.
- No Cash Value: Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Smith dies before her husband.
- Social Security Offset: There is a reduction in benefits when Mrs. Smith reaches age 62 (to account for Social Security benefits) or should she receive payments from the Department of Veteran's Affairs.

The court should always consider SBP coverage for the former spouse as part of marital property division.

**SBP Overview**

For married persons on active duty, the election for SBP must be made before or at retirement.[45] Reservists can make the election upon completion of 20 years of creditable service, and they have a second chance to elect SBP coverage upon reaching age 60.[46] Outside of this "second chance" for Reservists, the choice to participate or not is generally irrevocable. A spouse loses eligibility as an SBP beneficiary upon divorce. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a divorced spouse may receive a survivorship annuity is if *former spouse coverage* is elected. A court order cannot, by itself, be used to create coverage. A signed election request must be submitted by the servicemember or, in some cases, the former

[45] 10 U.S.C. § 1448(a)(2)(A).
[46] 10 U.S.C. § 1448(a)(2)(B).

spouse, before coverage can be established.

Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurred after retirement. Retirees participating in the SBP must elect former spouse coverage within one year from the date of the divorce.

A change in the law effective November 14, 1986, allowed state courts to order servicemembers to participate in SBP and to designate their spouses or former spouses as beneficiaries.[47] North Carolina law allows the court to divide a survivor annuity.[48]

A servicemember must submit a change request for his or her SBP beneficiary from spouse to former spouse within one year of the divorce. If the member fails or refuses to make the required election, that member shall be deemed to have made such an election if the former spouse sends DFAS a written request for coverage from the former spouse and a certified copy of a court decree mandating coverage. The request must be signed by the former spouse and received by DFAS *within one year of the decree that grants her SBP coverage*. There's no form for a "deemed election" request, and the election becomes effective on the first day of the first month which begins after the date of the order.

SBP entitlement stops upon the former spouse's remarriage when this occurs before age 55. Annuity entitlement will be reinstated if the former spouse's marriage is terminated. There is no effect on SBP if the former spouse is 55 or older at the time of remarriage.

Receipt of a valid former spouse election terminates any existing SBP coverage of the retiree, and former spouse coverage cannot be combined with coverage for a current spouse. An election of former spouse coverage is basically irrevocable, meaning that the member may not terminate SBP coverage once it is elected; however, the law allows the member to request a change in annuity coverage if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. This request must be made within one year from the date of marriage or the child's birth.

If a copy of the final divorce decree has not been sent to DFAS, one should be submitted. A copy of the final decree is required before any change in the member's SBP can be effected. A current spouse will be notified of the election to provide coverage for a

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47 10 U.S.C. § 1450(f).

48 Workman v. Workman, 418 S.E.2d 269 (N.C. App. 1992)

member's former spouse, but she or he cannot veto that election.[49] When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.[50]

If a servicemember elects not to participate in SBP upon retirement, that decision is usually irrevocable. However, Congress established an "open enrollment period" from March 1, 1999 to February 29, 2000, during which former servicemembers could change their current level of SBP participation or could choose to participate in the program for the first time. Congress may again choose to create other open enrollment periods in the future, and a good drafter will include a provision for this in an agreement or order prepared for the spouse of a member who has already declined SBP coverage.[51]

**Military Medical Coverage and Divorce**

Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unmarried former spouses of military members. It is important to remember that *these are statutory entitlements*; they belong to the nonmilitary spouse if she or he meets the requirements set out below. They are not terms that may be given or withheld by the military member, and thus they should not ordinarily be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

If the former spouse was married to a member (or former member) for at least 20 years, the member performed at least 20 years of creditable service, and there was an overlap of at least 20 years between these two, then the spouse (also called a "20/20/20" spouse), is entitled to full military medical care, which means TRICARE (military medical insurance) and treatment at military hospitals on a space-available basis, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.[52]

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49 10 U.S.C. § 1448(b)(2).

50 *See, e.g.,* Rockwell v. Rockwell, 77 N.C. App. 381, 335 S.E.2d 200 (1985).

51 Additional resources that are helpful in understanding the Survivor Benefit Plan and the rights and entitlements of survivors of military members and retirees include Department of the Army Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 1989) and SBP Made Easy, The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529.

52 10 U.S.C. § 1062.

If the spouse had a 20-year marriage to a member who served for 20 years and there was a 15-year overlap, then this is a "20/20/15" spouse. If she is not enrolled in an employer-sponsored health insurance plan, then the length of time that she is entitled to full military medical care depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for this spouse.

- If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as he or she does not remarry.
- If the decree date is on or after April 1, 1985, then the former spouse is entitled to full military medical care for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy"[53] under the DOD Continued Health Care Benefit Program (CHCBP). This is a health insurance plan negotiated between the Secretary of Defense and a private insurer. The purchase must be within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe. Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later. Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is *not* part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license),

a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

**Drafting and Submitting the Order**

A military pension division order requires specific findings of fact and decretal provisions. There are also specific logistical steps required to serve the order on the finance center and get it approved for direct payment. The findings of fact in such direct-pay orders should include:

- Addresses of plaintiff and defendant
- Social Security Numbers of the parties
- Statement that the member's rights under the Soldiers' and Sailors' Civil Relief Act were protected.
- Branch of service of military member
- Years of marriage and of service
- Grade/rank of military member
- Jurisdictional findings under
- 10 U.S.C. § 1408(c)(4)

The decretal portion of a direct-pay order is equally important. To be sure the order is properly served and honored, the practitioner should be sure that five steps are taken:

1) A certified copy of the order is served on DFAS, which should ordinarily be by certified mail, return receipt requested.[54]

2) The decree specifies the correct address for payment by DFAS to the spouse or former spouse.

3) Payments are to be made once a month, starting no earlier than 90 days after service of the decree on DFAS.

4) Payments shall end no later than the death of the member or spouse, whichever occurs first.

5) The payments shall be prospective only; no arrears are allowed.

- For service on DFAS, the addresses of the military finance centers are:
- **ARMY, NAVY, AIR FORCE, MARINES**: Defense Finance and Accounting Service - Cleveland, ATTN: DFAS-GAG/CL, Post Office Box 998002, Cleveland, OH 44199-8002 (800) 321-1080

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53 10 U.S.C. § 1086(a).

54 The original provisions of USFSPA required return receipt requested certified mail for all service on DFAS. As of 1997 this was amended to allow for regular mail, e-mail, fax, or certified mail service on DFAS. This should improve and simplify communications between former spouses, military members and DFAS. For record-keeping purposes, however, it is still recommended that service on DFAS be by certified mail, return

- **COAST GUARD**: Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 Quincy Street, Topeka, KS 66683-3591 (785) 339-3415
- **PUBLIC HEALTH SERVICE** Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001 (800) 638-8744

It is also important to note that the decree must be certified within 90 days of service on the finance center. An application letter to be signed by the spouse should also be included, and a copy of such a letter (DD Form 2293) can be obtained from the appropriate finance center or from the DFAS website, www.dfas.mil. A sample military pension division order is found at ATCH 6, and a judge's checklist for such orders is at ATCH 7.

One final point to remember is the requirement of a marriage of ten years' duration concurrent with ten years of military service as the basis for direct pension division payments from DFAS. The USFSPA only allows direct pension payments pursuant to "a final decree of divorce, dissolution, annulment, or legal separation issued by a court" or a property settlement that is ratified or approved by the court and issued incident to such a final decree.[55] This "10 year test" is *not a jurisdictional requirement* for dividing military pensions; rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless this test is met.[56] When there is less than ten years' service or less than ten years' marriage, the court may still divide the pension. But the retiree will have to pay the spouse directly.

**Additional Resources**

Help is not far away for the judge who needs to learn more about military divorce issues. One of the best places to start is the home page for the North Carolina State Bar's Standing Committee on Legal Assistance for Military Personnel, www.ncbar.com/home/lamp.htm. The Co-Counsel Bulletins and Silent Partner information letters contain a wealth of knowledge, research and practical tips on SSCRA, military pension division, custody, visitation, divorce, paternity and child support. The same applies

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receipt requested.

[55] 10 U.S.C. § 1408(a)(2).

to the website for the Military Committee of the American Bar Association's Family Law Section: www.abanet.org/family/military.

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[56] *See, e.g.,* Carranza v. Carranza, 765 S.W. 2d 32 (Ky. App. 1989).

**ATCH 1**
1ST INFANTRY DIVISION MEMO ON ARMY PERSONNEL AND REQUESTED SERVICE OF PROCESS

AETV-BGLA-LA 1 November 2001

MEMORANDUM FOR Department of the Army Personnel

SUBJECT: Requests by State Authorities for Overseas Service of Process

1. This memorandum details the responsibilities of U.S. Army personnel requested to serve process on a person overseas.

2. AR 27-40, 2-5(c) states that if an Army official receives a request to serve State court process on a person overseas, the following steps should be taken:

a. The Army official will determine if the individual wishes to accept service voluntarily;

b. The individual will be permitted to seek counsel;

c. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned.

3. In Germany, service of process is only permissible through the procedures set forth in the Hague Convention on Service of Process.

4. A memorandum detailing those procedures accompanies this letter. However, if you have any questions or concerns regarding the Hague Convention or your responsibilities under AR 27-40, 2-5(c), please feel free to contact me at DSN 476-2290.

DAN STIGALL
First Lieutenant, JA
Legal Assistance Attorney Hague Service Memo

AETV-BGLA-LA 1 November 2001

MEMORANDUM FOR Department of the Army Personnel in Germany Acting in Accordance with AR 27-40, 2-5(c)

SUBJECT: International Service of Process

1. This memorandum outlines the basic procedure for international service of process in Germany. It is not meant as a complete source of information on the Hague Service Convention or its procedures,

but only as a basic guide for DA Personnel in Germany acting in accordance with AR 27-40, 2-5(c). It is derived from U.S. Army JAG Corps as well as U.S. State Department publications.

2. International service of process in Germany is to be effected **only** through the Hague Service Convention. Due to a German reservation under Article 10 of the Convention, service of process by direct mail in Germany is not allowed. American courts have consistently held that international mail service of civil process is invalid in the case of countries that have made such reservations. Further, under German law, only designated officials may effect service of process and attempts by those not so designated may result in criminal charges.

3. In order to effect service through the Hague Service Convention, parties in the United States should obtain a copy of the Request for Service Form (DJ-USM-94) from their local U.S. Marshal's service. They may also contact Headquarters, U.S. Marshal's Service at (202) 307-9110 for information on obtaining a Request for Service Form.

4. Another German reservation to the Hague Convention states that in order for service in Germany to be effective, documents to be served must be accompanied by German translations. These translations should be certified. Note, however, that the Request for Service Form (DJ-USM-94) need not be translated into German.

5. The attorney representing the party seeking service should execute the Request for Service Form including the portion marked "Identity and Address of the Applicant" and the "Name of the Requesting Authority" portion of the Summary Document to be served.

6. The completed Request for Service Form and accompanying documents must then be mailed to the appropriate "Central Authority". Note that each "Land" (political subdivision) in Germany has its own specific Central Authority. The address of every Central Authority is available online at the following U.S. State Department website: www.travel.state.gov/hague_service.html.

7. In Germany, the Central Authority forwards the documents to be served to the Local Court ("Amtsgericht") in the area where the individual to be served is located. The Registry of that Local Court ("Geschaftsselle des Amtsgerichts") then serves the individual in accordance with the German Code of Civil Procedure.

8. If you have any further questions regarding international service of process in Europe,

contact the Foreign Law Branch, International Law Division, Office of The Judge Advocate, Headquarters U.S. Army, Unit 29351, (Heidelberg, Germany) APO AE 09014 or contact the Legal Assistance Office at DSN 476-2290.

DAN STIGALL
First Lieutenant, JA

**ATCH 2**
September 3, 1999

Foreign Law Branch
Great Plains Child Support Office
ATTN: Carla D. Haddox, Staff Attorney
P.O. Drawer 2337
Lawton, Oklahoma 73502

Subject: Service of State Court Process on U.S. Military Personnel in Europe

Reference: Your correspondence of August 26, 1999

Dear Ms. Haddox:

Attached for your information is an extract of 32 CFR Part 516 (Published in the Federal Register Vol. 59, No 143, July 27, 1994) which, in § 516.12(c), prescribes Department of the Army policy concerning service of state court process on Army personnel overseas. In essence, Army policy is that assistance will be rendered to effect service of process only if the party to be served voluntarily accepts such service.

If the individual declines to voluntarily accept the documents, service can be effected overseas pursuant to the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" of November 15, 1965, (Hague Service Convention), which came into force for the United States on February 10, 1969. The text of the Convention may be found in Title 28, USCA, Federal Rules of Civil Procedure (Appendix following Rule 4 FRCvP), or in Volume VII of the Martindale-Hubbell International Law Digest, Part VII: "selected International Conventions" (1993 Edition).

The Hague Service Convention, to which the Federal Republic of Germany is a party, provides for personal service of process by a Central Authority. A completed "Request and Summary" (see Martindale-Hubbell for the appropriate forms), should be transmitted with the documents to be served directly to the appropriate Central Authority. A Request Form USM-94, together with further information on the Hague Service Convention, may also be obtained from the nearest U.S. Marshal's Office. Ask for Department of Justice Memorandum No. 386, Revision 3.

Germany has designated the Ministry of Justice for the *Land* (German state) in which the individual to be served resides as the Central Authority. A list of the State Ministries of Justice is enclosed. The addresses of the Ministries of Justice for each respective *Land* is enclosed. Most U.S. military personnel are located in Baden-Wuerttemberg, Bavaria (Bayern), Hessen, (Hesse) or Rhineland-Palatinate (Rheinland-Pfalz). The address of the appropriate Ministry of Justice should be entered on Form USM-94 in the box marked "address of receiving authority."

In connection with service by mail, you should be aware that it is the position of the U.S. Forces, consistent with that of the commentators in U.S.C.A. Federal Rules of Civil Procedure, Rule 4, that "if there is any 'internationally agreed means' for giving notice, that means must be used." As

the U.S. and Germany are both parties to the Hague Convention, that means must be used to effect service of U.S. process in Germany unless voluntary service is effected.

The commentators go on to note:

In several cases, notably those attempting service in Germany, service was quashed because it conflicted with conditions Germany imposed in adopting the Convention. One condition Germany has imposed is that the papers served bear a German translation. Another is that service not be made by direct mail. In *Vorhees v. Fischer & Krecke,* 697 F.2d. 574 (CA4 1983), both conditions were breached and service was quashed…A similar quashing of service in Germany was the result in *Harris v. Browning-Ferris Industries Chemical Services, Inc.* 100 FRD 775 (MD La. 1984), where the mail method used was one authorized by state law, adopted for federal use and available even for foreign service under the pre-1993 version on Rule 4 and where again the papers served carried no translation. State courts, of course, equally bound by the Convention, hold the same way. An example is *Low v. Bayerische Motoren Werke, A.G.,* 88 A.D.2d 504, 449 N.Y.S.2d 733(1982) (USCA , FRCP Rule 4, pp. 64, 66).

The provisions of the NATO Status of Forces Supplementary Agreement governing service of civil process have no application here. Those rules apply only to service of German civil process. Service of foreign process on U.S. Forces personnel in the Federal Republic of Germany (including process of U.S. state courts) is effected pursuant to the Hague Service Convention, cited above.

In light of the above, we recommend you attempt to effect service on U.S. military personnel stationed in Germany (and those other countries in Europe who are parties thereto) pursuant to the provisions of the Hague Service Convention.

Sincerely,

Paul J. Conderman
Attorney-Advisor
Deputy Chief, Foreign Law Branch

Enclosure

*September ??, 1999*

*Subject:* ***?***
*Your File:* ***?***
*Reference: Your correspondence of* ***?*** *, 1999, requesting service of state court documents on* ***?***

*Dear* ***?****:*

*Attached for your information is an extract of 32 CFR Part 516 (Published in the Federal Register Vol. 59, No 143, July 27, 1994) which, in § 516.12(c), prescribes Department of the Army policy concerning service of state court process on Army person-nel overseas. In essence, Army policy is that assistance will be rendered to effect service of process only if the party to be served voluntarily accepts such service.*

*If the individual declines to voluntarily accept the docu- ments, service can be effected overseas pursuant to the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" of November 15, 1965, (Hague Service Convention), which came into force for the United States on February 10, 1969. The text of the Convention may be found in Title 28, USCA, Federal Rules of Civil Procedure, (Appendix following Rule 4, FRCvP), or in Martindale-Hubbell International Law Digest, Part VII: "Selected International Conventionss "(1993 Edition).*

*The Hague Service Convention, to which the Federal Republic of Germany is a party, provides for service of process by a Central Authority pursuant to a request submitted on Form USM-94. This form, together with further information on the Hague Service Convention, may be obtained from the nearest U.S. Marshal's Office. Ask for Department of Justice Memorandum No. 386, Revi-sion 3, of July 1979.*

*Pursuant to the Convention, personal service may be obtained by sending a completed "Request and Summary" (See Martindale-Hubbell for the appropriate forms), with the documents to be served directly to the appropriate Central Authority. It is important to read the footnotes of the Convention, which contain the German reservations. The reservations include the address for the designated Central Authorities. Each Land, or state, of the Federal Republic of Germany, has its own Central Authority.*

*One of the German reservations states that the documents to be served must be accompanied by German translations thereof. This is a requirement upon which the Central Authorities generally insist. The documents to be served and their translations should be in duplicate. The "request and Summary" themselves need not be translated into German.*

*Since Hanau, where* ***?????*** *is stationed, is located in the German state of Hesse (Hessen), the appropriate Central Authority in this case would be:*

*Hessisches Ministerium der Justiz und für Europaangelegenheiten*
*Luisenstr. 13*

*65185 Wiesbaden*
*Federal Republic of Germany*

*This address should be entered on Form USM-94 in the box marked "address of receiving authority."*

*The provisions of the NATO Status of Forces Supplementary Agreement governing service of civil process have no application in this case. Those rules apply only to service of German civil process. Service of foreign process on U.S. Forces personnel in the Federal Republic of Germany (including process of U.S. state courts) is effected pursuant to the Hague Service Convention, cited above.*

*Following receipt of your letter, this office contacted the unit to which the above-named soldier is assigned. We were advised that **?** (had departed the unit for reassignment in the United States) (departed the unit and returned to the United States for discharge from active military service)(, having been interviewed and advised as provided in paragraph § 516.12(c) of 32 CFR 516, declined to accept voluntary service.)*

*In light of the above, we recommend you attempt to effect service on **?????** pursuant to the provisions of the Hague Service Convention. The enclosure(s) to your correspondence are returned herewith.*

*Sincerely,*

**ATCH 3**

**REPLY TO**
**ATTENTIO**

January 24, 2003

Foreign Law Branch

**Via email to**
Ms. L. Parker

Dear Ms. Parker:

This responds to your request for assistance in serving US State Court Process on a US Army soldier in the United Kingdom. Title 32 of the Code of Federal Regulations § 516.12(c), prescribes Department of the Army policy concerning service of state court process on Army personnel overseas, as follows:

Process of State courts. If a DA official receives a request to serve State court process on a person overseas, he or she will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, Th Hague Convention, reprinted in 28 U.S.C.A. Federal Rules of Civil Procedure, following Rule 4.)

As noted in the text above, if the individual declines to voluntarily accept the documents, service can be effected overseas pursuant to the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" of November 15, 1965, (Hague Service Convention), which came into force for the United States on February 10, 1969. The text of the Convention and related information may be found online at the Department of State Private International Law Database: http://www.state.gov/www/global/legal_affairs/judicial.html. It is also available in hard copy in Title 28, United States Code Annotated, Federal Rules of Civil Procedure (Appendix following Rule 4 FRCvP), or in Volume VII of the Martindale-Hubbell International Law Digest, Part VII: "selected International Conventions."

The Hague Service Convention provides for personal service of process by a Central Authority. A completed "Request and Summary" (see Martindale-Hubbell for the appropriate forms), should be transmitted with the documents to be served directly to the appropriate Central Authority. A Request Form USM-94, together with further information on the Hague Service Convention, may also be obtained from the nearest U.S. Marshal's Office. Ask for Department of Justice Memorandum No. 386, Revision 3.

The United Kingdom signed the Hague Service Convention December 10, 1965. It ratified the Convention on November 17, 1967, and the Convention entered into effect there on February 10, 1969. The British instrument of ratification contained the following declarations:

"*(a)* In accordance with the provisions of Articles 2 and 18 of the Convention, Her Majesty's Principal Secretary of State for Foreign Affairs is designated as the Central Authority; and the Senior Master of the Supreme Court, Royal Courts of Justice, Strand, London W.C.2, the Crown Agent for Scotland*, Lord Advocate's Department, Crown Office, 9 Parliament Square, Edinburgh 1, and the Registrar of the Supreme Court **, Royal Courts of Justice, Belfast 1, are designated as additional authorities for England and Wales, Scotland and Northern Ireland respectively.

* By a Note of 21 March 2000, the British Government notified that, with effect from 1 April 2000, the designated authority for Scotland will be: "The Scottish Executive Justice Department, Civil Justice & International Division, Hayweight House, 23 Lauriston Street, Edinburgh EH3 9DQ, tel.: +44.131.221.6815, fax: +44.131.221.6894".

** By a Note of 10 June 1980 the British Government notified that instead of the Registrar of the Supreme Court of Northern Ireland, designated in 1967 as the additional authority for Northern Ireland in conformity with Article 18 of the Convention, the Master (Queen's Bench and Appeals) is designated as the said additional authority. The address of the Master (Queen's Bench and Appeals) is Royal Courts of Justice, Belfast 1.)

*(b)* The authorities competent under Article 6 of the Convention to complete the Certificate of Service are the authorities designated under Articles 2 and 18.

*(c)* In accordance with the provisions of Article 9 of the Convention, the United Kingdom designates as receivers of process through consular channels the same authorities as those designated under Articles 2 and 18.

*(d)* With reference to the provisions of paragraphs *(b)* and *(c)* of Article 10 of the Convention, documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States.

*(e)* The United Kingdom declares its acceptance of the provisions of the second paragraph of Article 15 of the Convention.

*(f)* In accordance with the provisions of the third paragraph of Article 16 of the Convention, the United Kingdom declares, in relation to Scotland only, that applications for setting aside judgments on the grounds that the defendant did not have knowledge of the proceedings in sufficient time to defend the action will not be entertained if filed more than one year after the date of judgment.

The authorities designated by the United Kingdom will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

A notification under the second and third paragraphs of Article 29 regarding the extension of the Convention to the territories for the international relations of which the United Kingdom is responsible will be addressed to the Royal Netherlands Government in due course."

The address of the appropriate Central Authority:

**Lord Chancellor's Department** **International & Common Law Services Division**
**3rd floor, Southside**
**105 Victoria Street**
**LONDON SW1E 6QT**
**c/o Mr Jack Pavey, International Division**
**tel.: +44 (20) 7210 0743**
**fax: +44 (20) 7210 0746**
**e-mail: jpavey@lcdhq.gsi.gov.uk**

should be entered on Form USM-94 in the box marked "address of receiving authority."

In connection with service by mail, you should be aware that it is the position of the US Forces, consistent with that of the commentators in U.S.C.A. Federal Rules of Civil Procedure, Rule 4, that "if there is any 'internationally agreed means' for giving notice, that means must be used." As the US and Japan are both parties to the Hague Convention, that means must be used to effect service of US process in Japan unless voluntary service is effected.

In light of the above, we recommend you attempt to effect service on the soldier in the United Kingdom pursuant to the provisions of the Hague Service Convention. Should you have questions, Point of Contact here is the undersigned.

Sincerely,

/original signed by/
Paul J. Conderman
Attorney-Advisor
**Acting Chief, Foreign Law Branch**

**DEPARTMENT OF THE ARMY**
HEADQUARTERS, U.S. ARMY EUROPE and SEVENTH ARMY
OFFICE OF THE JUDGE ADVOCATE
57
UNIT 29351
APO AE 09014-9351

**ATCH 4**

**REPLY TO ATTENTION O**

June 19,2002
Foreign Law Branch

**Via email to**
Ms. Jennifer M. Vaughan
Henderson, NV

Dear Ms. Vaughan:

This responds to your request for assistance in serving Nevada State Court Process on PFC Pietro Joseph Monticelli, currently stationed with Headquarters and Headquarters Company, 2/503 Infantry, APO AE 09630, a US Army unit in Vicenza, Italy. Title 32 of the Code of Federal Regulations § 516.12(c), prescribes Department of the Army policy concerning service of state court process on Army personnel overseas, as follows:

> Process of State courts. If a DA official receives a request to serve State court process on a person overseas, he or she will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, Th Hague Convention, reprinted in 28 U.S.C.A. Federal Rules of Civil Procedure, following Rule 4.)

As noted in the text above, if the individual declines to voluntarily accept the documents, service can be effected overseas pursuant to the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" of November 15, 1965, (Hague Service Convention), which came into force for the United States on February 10, 1969. The text of the Convention and related information may be found online at the Department of State Private International Law Database: http://www.state.gov/www/global/legal_affairs/judicial.html. It is also available in hard copy in Title 28, United States Code Annotated, Federal Rules of Civil Procedure (Appendix following Rule 4 FRCvP), or in Volume VII of the Martindale-Hubbell International Law Digest, Part VII: "selected International Conventions."

The Hague Service Convention provides for personal service of process by a Central Authority. A completed "Request and Summary" (see Martindale-Hubbell for the appropriate forms), should be transmitted with the documents to be served directly to the appropriate Central Authority. A Request Form USM-94, together with further information on the Hague Service Convention, may also be obtained from the nearest U.S. Marshal's Office. Ask for Department of Justice Memorandum No. 386, Revision 3.

Italy signed the Hague Service Convention January 25, 1979. It ratified the Convention on

November 25, 1981, and it entered into effect there January 24, 1982. The Italian instrument of ratification contained the following declarations:

*a)* Pursuant to Articles 2 and 18, "l'Ufficio unico degli ufficiali giudiziari presso la corte d'appello di Roma" (the registry of the court of appeal in Rome) is designated as the Central Authority for the purpose of Article 5;

*b)* "gli uffici unici degli ufficiali giudiziari costituiti presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture" (The registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to issue the certificate pursuant to Article 6;

*c)* "gli uffici unici degli ufficiali giudiziari presso le corti di appello e i tribunali e gli ufficiali giudiziari addetti alle preture" (The registries of the courts of appeal and other courts, and the bailiffs appointed to the courts of first instance) are competent to receive for the purpose of service, documents forwarded by consular or diplomatic authorities pursuant to Article 9;

*d)* the costs proceeding from each request for service in accordance with Article 5, first paragraph, under *a* and *b*, which requires the employment of a bailiff, have to be paid in advance in the amount of 6,000 lira, subject to adjustment at the time of return of the document served.

However, the costs in relation to the document served pursuant to Article 12, paragraph 2, of the Convention, can be paid after its return to the extent specifically fixed by the bailiff. The Italian State shall not require any advance or repayment of costs for service of documents requested by the Contracting States in so far as those States for their parts shall not require the payment or repayment of costs for documents originated from Italy.

The address of the appropriate Central Authority:

**L'Ufficio unico degli ufficiali**

**giudiziari presso la corte d'appello la corte**
**d'appello di Roma**
**Rome, Italy**

should be entered on Form USM-94 in the box marked "address of receiving authority."

In connection with service by mail, you should be aware that it is the position of the US Forces, consistent with that of the commentators in U.S.C.A. Federal Rules of Civil Procedure, Rule 4, that "if there is any 'internationally agreed means' for giving notice, that means must be used." As the US and Italy are both parties to the Hague Convention, that means must be used to effect service of US process in Italy unless voluntary service is effected.

In light of the above, we recommend you attempt to effect service on PFC Monticelli pursuant to the provisions of the Hague Service Convention. Should you have questions, Point of Contact here is the undersigned.

Sincerely,

/original signed by/
Paul J. Conderman
Attorney-Advisor

Deputy Chief, Foreign Law Branch

HEADQUARTERS, U.S. ARMY EUROPE and SEVENTH ARM
OFFICE OF THE JUDGE ADVOCATE
UNIT 29351
60 APO AE 09014-9351

**ATCH 5**

REPLY TO
ATTENTION OF:

January 3, 2003

Foreign Law Branch

**Via email to**

Ms. Debra Opri
Beverly Hills, CA

Dear Ms. Opri:

This responds to your request for assistance in serving CaliforniaState Court Process on a US Army soldier in Japan. Title 32 of the Code of Federal Regulations § 516.12(c), prescribes Department of the Army policy concerning service of state court process on Army personnel overseas, as follows:

Process of State courts. If a DA official receives a request to serve State court process on a person overseas, he or she will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, The Hague Convention, reprinted in 28 U.S.C.A. Federal Rules of Civil Procedure, following Rule 4.)

As noted in the text above, if the individual declines to voluntarily accept the documents, service can be effected overseas pursuant to the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" of November 15, 1965, (Hague Service Convention), which came into force for the United States on February 10, 1969. The text of the Convention and related information may be found online at the Department of State Private International Law Database: http://www.state.gov/www/global/legal_affairs/judicial.html. It is also available in hard copy in Title 28, United States Code Annotated, Federal Rules of Civil Procedure (Appendix following Rule 4 FRCvP), or in Volume VII of the Martindale-Hubbell International Law Digest, Part VII: "selected International Conventions."

The Hague Service Convention provides for personal service of process by a Central Authority. A completed "Request and Summary" (see Martindale-Hubbell for the appropriate forms), should be transmitted with the documents to be served directly to the appropriate Central Authority. A Request Form USM-94, together with further information on the Hague Service Convention, may also be obtained from the nearest U.S. Marshal's Office. Ask for Department of Justice Memorandum No. 386, Revision 3.

Japan signed the Hague Service Convention March 12, 1970. It ratified the Convention on May 28, 1970, and it entered into effect there on July 27, 1970. The Japanese instrument of ratification contained the following declarations:

"(1) The Minister for Foreign Affairs is designated as the Central Authority which receives requests for service from other Contracting States, pursuant to the first paragraph of Article 2.

(2) The District Court which has rendered judicial aid with respect to the service is designated as the authority competent to complete the certificate in the form of the model annexed to the Convention, pursuant to the first paragraph of Article 6.

(3) The Minister for Foreign Affairs is designated as the authority competent to receive documents transmitted through consular channels, pursuant to the first paragraph of Article 9.

(4) It is declared that the Government of Japan objects to the use of the methods of service referred to in sub-paragraphs *(b)* and *(c)* of Article 10.

(5) It is declared that Japanese courts may give judgment if all the conditions specified in the second paragraph of Article 15 are fulfilled."

The address of the appropriate Central Authority:

**Ministry of Justice**
**Government of Japan**
**Civil Affairs Bureau**
**TOKYO, JAPAN**
**Tel.: +81 (3) 3592 7114; Fax: +81 (3) 3592 7039**
**e-mail: CAB-JPN@moj.go.jp**

should be entered on Form USM-94 in the box marked "address of receiving authority."

In connection with service by mail, you should be aware that it is the position of the US Forces, consistent with that of the commentators in U.S.C.A. Federal Rules of Civil Procedure, Rule 4, that "if there is any 'internationally agreed means' for giving notice, that means must be used." As the US and Japan are both parties to the Hague Convention, that means must be used to effect service of US process in Japan unless voluntary service is effected.

In light of the above, we recommend you attempt to effect service on the soldier in Japan pursuant to the provisions of the Hague Service Convention. Should you have questions, Point of Contact here is the undersigned.

Sincerely,

/original signed by/
Paul J. Conderman
Attorney-Advisor
Acting Chief, Foreign Law Branch

## ATCH 6 – Sample Military Pension Division Order

[case caption]

THIS CAUSE came before the undersigned judge upon the plaintiff's claim for distribution of the defendant's military retirement benefits. The parties, having resolved this matter, agree to the entry of the following military pension division order to assign to plaintiff a portion of those benefits. The court makes the following:

### FINDINGS OF FACT

1. Plaintiff (hereinafter also referred to as Wife) is a resident of _____ County, State of ___. Defendant (hereinafter also referred to as Husband) is a resident of ____ County, State of ___. The parties were married on *[date]* and were divorced in ____ County, State of _____, on *[date]* .

1. The marital portion of Defendant's military retired pay is subject to marital property division. Plaintiff is entitled to a share of the Defendant's military retirement benefits, as set out in the Decree below The Plaintiff's entitlement to retired pay accrues upon the retirement of Husband.

1. *[use this clause to protect the Wife if Husband is on active duty or already receiving retired pay]* At the time of this hearing, the Husband is receiving *[here state amount of pay, active duty or retired, plus any deductions]*, there is no waiver for VA disability compensation, and the court bases the award to Wife set out below on these facts.

1. Wife's address is ____. Her Social Security number is ____.

*1.* Husband's address is ____. His Social Security number is ____. His date of birth is ____.

1. *[if Husband is now on active duty]* Husband is on active duty in the *[branch of service]*. His rights under the Soldiers' and Sailors Civil Relief Act, 50 U.S.C.App. 501-548 and 560-591, have been observed and honored.

*[if member is retired, use the following language in place of the above paragraph]* Husband retired from *[branch of military service]* on *[date]*.

1. *[use this clause to protect nonmilitary spouse from unexpected reduction in payments due to member's electing VA disability pay]* It is intended that the Wife shall receive her full share of Husband's military retired pay, calculated as set out below and without reduction for disability compensation (VA disability pay or military disability retired pay) or any other reason. Husband agrees to indemnify Wife for any such reduction.

### CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

1. Plaintiff is entitled to an assignment of Defendant's military retirement benefits as set forth herein, subject to the conditions set forth in the Decree below.

1. The facts above are incorporated herein by reference to the extent that they represent conclusions of law.

1. The terms of this order are fair, reasonable, adequate and necessary.

1. The parties have knowingly and voluntarily consented to this order.

1. The parties are entitled to the relief granted below.

**DECREE**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

I. Effective *[date]*, as division of military retired pay as marital property, Husband shall pay to Wife

*[Option A: Usually used when Husband is on active duty; spouse gets 50% -- or other percent -- of marital share of member's disposable retired pay; this increases with cost-of-living adjustments (COLA) for member; this favors spouse]* ___% of the marital share of his disposable retired pay. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service.

*[Option B: Usually used when Husband is already retired; spouse gets 50% -- or other percent -- of member's disposable retired pay; this increases with cost-of-living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases post-divorce; this favors spouse]* % of his disposable retired pay each month.

*[Option C: spouse gets fixed dollar amount, which may not exceed 50% of disposable retired pay; no COLA adjustments for spouse; this favors member]* $____ per month.

*[Option D: spouse receives a hypothetical amount, based on the grade and years of service of member at time of separation, divorce or other date; no COLA unless specified; this clause favors the member]* ___% of the disposable retired pay of a *[grade or rank]* with ____ years of creditable service.
– OR -- ____% of the marital share of the disposable retired pay of a *[grade or rank]* with ____ years of creditable service. The marital share is a fraction made up of _____ months of marital pension service, divided by the total months of Husband's military service at date of *[divorce, separation, retirement, etc., according to state law]*. *[If COLA is desired for Wife, then add the following language:* Wife shall be entitled to the same cost-of-living-adjustments (COLA) adjustments on her share of the pension as Husband receives on his share.*]*

I. Husband has served at least ten years of creditable service concurrent with at least ten years of marriage to Wife. Wife is entitled to direct payments from DFAS and DFAS shall make same. Wife shall receive payments at the same time as the Husband.

I. Until DFAS payments begin, Husband shall be responsible for making these payments each month to Wife as soon as he receives same.

I. The Wife shall notify DFAS in writing about any changes in the parties' addresses or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

I. Husband shall provide promptly to Wife any information that she needs in order to have this order honored for direct payment of military pension benefits and shall keep her informed at all times of his current address.

I. Wife shall tender a certified copy of this order to DFAS along with an executed DD Form 2293.

*[use one of the following clauses if there is no 10-year/10-year overlap as stated therein]* Husband will pay Wife directly the amount specified in the preceding paragraph. Payments will be due on the first of each month, beginning *[date]*. -OR- Husband will pay Wife by a voluntary allotment from his retired pay the amount specified in the preceding paragraph. Wife shall receive payments at the same time as the Husband. Until DFAS begins making these payments to Wife, Husband shall be responsible for making these payments each month to her.

*[as another alternative, the parties may agree to payment from Husband to Wife of alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should be utilized]*

*[use this in the event federal law changes to allow direct payments without the 10/10 overlap]* In the event that federal law changes to allow direct payments from DFAS to Wife, then this order shall be submitted to DFAS by Wife to accomplish this.

*I. [for protection for nonmilitary spouse regarding VA disability pay]* The Husband and Wife have agreed upon a set level of payments to Wife to guarantee income to her, based upon military retired pay without deductions for disability compensation (VA disability pay or military disability retired pay). They consent to the court's retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Husband should waive military retired pay for an equivalent amount of disability compensation, thus reducing Wife's share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Wife's share or amount to the pre-waiver level or to require payments or property transfers from Husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court in this order.

-OR-

The Husband and Wife have agreed upon an anticipated level of payments to Wife to guarantee income to her. That level is defined as *[here state specifically what is anticipated, such as "Husband's longevity retired pay will be about $2,000 per month, and Wife will receive one-half of that times 15 years of marriage during military service divided by 20 years of military service."]*. He hereby guarantees this and agrees to indemnify and hold Wife harmless as to any breach hereof. Furthermore, if Husband takes any action not approved by the court (such as waiving retired pay in favor of disability compensation) that

reduces the amount or share Wife receives, then he shall pay her directly the amount by which her share or amount is reduced as spousal support [OR as additional property division payments]. In addition, he hereby consents to the payment of this amount from any periodic payments he receives (such as wages or retired pay from any source), and this clause may be used to establish his consent (when this is necessary) for the entry of an order for garnishment, wage assignment or income withholding.

*I.* *[to protect nonmilitary spouse if member does not retire but "rolls over" his military service for federal/state government pension service credit]* If Husband fails to retire for military service and elects to "roll over" time in his military service into other federal government service in order to get credit for same, then the Wife shall be entitled to her share if any federal retirement pay or annuity he receives based on the parties' period of marriage during Husband's period of military service. Husband shall notify Wife immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, DD Form 214. Husband shall notify Wife immediately if he is employed by the federal government, and to include in said notification a copy of his employment application and his employment address. Any subsequent retirement system of Husband shall honor this court order to the extent of Wife's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

I. *[to protect spouse if future information is needed regarding member's status, location or benefits]* If Husband breaches this order and also fails to provide Wife with his date of retirement, last unit of assignment, final rank or grade, final pay, present and past retired pay and current address, then he waives any privacy or other rights as may be required for her to obtain these specific items of information. He hereby authorizes Wife to request and obtain this and other information from the Department of Defense and from any federal department or agency.

- OR -

[*if husband will not agree with the above clause*] If Husband shall breach any terms in this document, then the court shall award to Wife any and all attorney's fees she may incur in obtaining information on the husband from the Department of Defense for enforcement of the provisions herein.

I. *[Optional - use when award of attorney's fees is desired]* If either party shall violate this court order, then the court shall award reasonable attorney's fees to the party requesting enforcement.

I. The monthly payments herein shall be paid to Wife regardless of her marital status and shall not end at remarriage. Any future overpayments to Wife are recoverable and subject to involuntary collection from Wife or from the estate of Wife. Wife shall be responsible for the taxes on the share received from DFAS of Husband's military retired pay. Wife shall not be entitled to any portion of retired pay upon the death of either party.

I. *[use this if Survivor Benefit Plan is elected. If a smaller spousal share is intended, a smaller base amount can be used. SBP benefits are 55% of the selected base amount up to age 62, when they reduce to 35%, and SBP premiums for a spouse or ex-spouse are generally 6.5% of the base amount, paid out of retired pay. SBP pays benefits to the beneficiary for her life.]* As to coverage of Wife by Husband's Survivor Benefit Plan (SBP):

A. Wife shall be the beneficiary of Husband's SBP. Upon their divorce, Wife shall remain his former spouse beneficiary, choosing as the base amount the full amount of his monthly retired pay and he shall do nothing to reduce or eliminate her benefits.

A. Wife shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending this order to DFAS with a certified copy of the divorce decree and a cover letter requesting a "deemed election."

*[if Husband may elect coverage at less than the full amount of his monthly retired pay, then use the following clause]* choosing as the base amount ____% of his monthly retired pay and he shall do nothing to reduce or eliminate her benefits.

I. If Husband does anything that changes the former spouse election, then an amount equal to the present value of SBP coverage for the Wife shall, at the death of Husband, become an obligation of his estate. In addition, the Wife shall be entitled to such remedies for breach as are available to her in a court of law.

I. *[The premium for SBP coverage is deducted from the member's gross retired pay before it is divided between the parties. This "off-the-top" deduction means that the parties share equally in the premium payment (or unequally if the division of military retired pay is other than 50-50). If the parties desire to allocate SBP costs entirely to the non-military spouse, this can be difficult. DFAS will not honor such a clause under current law. The clause below sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP.]* Wife shall reimburse Husband within 10 days of being notified in writing that he has incurred the expense of maintaining her as the irrevocable beneficiary, for whatever portion of the premium was paid from Husband's benefits.

*[In the alternative, one can allocate the cost of SBP premiums to the non-military spouse by the following steps: compute the premium cost, deduct that amount from the spouse's anticipated monthly amount of retired pay, and then divide her reduced share by the total gross retired pay. The resulting percentage is approximately what she should receive to have her pay for the full SBP premium. Go back to the clause above designating the percentage for the Wife and insert the revised percentage in place of 50% (or other fraction) of Husband's disposable retired pay.]*

_____ Date:_____
District Court Judge

[if consent order, add the following]
WE CONSENT:
[signatures of parties, with notarizations, and of attorneys]

**ATCH 7**

# Judge's Checklist for Military Pension Division Orders

| ✔ | Issue | Comments |
|---|---|---|
| | Check for pension division jurisdiction – must be ON following: | Required by 10 U.S.C. 1408(c)(4) |
| | 1.___Domicile in North Carolina | Check on state income taxes; home ownership; voting, vehicle title, t license; in-state tuition |
| | 2.___Consent to court's jurisdiction | General appearance – the filing of motions or pleadings which recogn authority |
| | 3.___Residence in N.C. but not due to military assig | Example – SM assigned to naval base in southeast VA but resides in for aged parents; NC has pension division jurisdiction. |
| | Receive evidence of period of creditable service for [SM] or retiree | Usually this is his LES [Leave and Earnings Statement], DD 214 [disc retirement orders, or "points statement" [for Reserve/Guard personn |
| | Calculate coverture fraction | Months of marital pension service [before separation] divided by tota [which will be "X" – unknown – for those not yet retired]. DFAS will containing total military service as an unknown, will make calculation retirement. |
| | State formula [for SM] or percentage [for retiree] | Usually this is 50% X coverture fraction X final retired pay |
| | Check for "10/10" direct-pay requirements | If payment to be made from DFAS [Defense Finance and Accounting to non-military spouse, then marriage and military service must over years |
| | Require direct pay by SM/retiree until DFAS begins p | DFAS will not pay non-military spouse until 90 days after retired pay |
| | Check on "back payments" for retiree | See if credit or recoupment needed for retiree who has received pen since separation. Part or all of these, depending on coverture fractio non-military spouse. |
| | Check for "20/20/20" for medical care | Non-military spouse will be entitled to full medical care benefits if the years of marriage [ending at divorce, not separation], 20 years of mi a 20-year overlap. Granting divorce too early can defeat this entitler |
| | Provide SBP [Survivor Benefit Plan] for non-military | Without this, pension payments stop at SM's death. In general, pren of pension "off the top" before division between parties; premiums a pension for spouse/former spouse coverage. |
| | ___ordering SM to elect [or retiree to maintain] SBP | |
| | ___at base amount of full retired pay; | SBP payments are 55% of SM's disposable retired pay if that base ar |
| | ___to be served on DFAS within one year of divorce SM/retiree], or one year of order granting coverage military spouse]; and | These are essential deadlines; if missed, coverage is lost. |
| | ___entry of order granting "former spouse coverage divorce | DFAS will only honor title designation (i.e., spouse coverage, former not designation by name, so new election must be submitted after di |
| | Use model military pension division order | |